(11)

No. 95-365-CFX
Status: GRANTED

Title: James Griffin Lane, Petitioner
v.
Federico F. Pena, Secretary of Transportation, et al.

Docketed:
September 5, 1995

Court: United States Court of Appeals for the District of Columbia Circuit

See also:
95-830

Counsel for petitioner: Smith Jr.,Walter A.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Sep 5 1995	G	Petition for writ of certiorari filed.
3	Oct 3 1995		Order extending time to file response to petition until November 6, 1995.
4	Nov 3 1995		Order further extending time to file response to petition until December 6, 1995.
5	Nov 27 1995		Brief amici curiae of American Council of the Blind, et al. filed.
6	Nov 27 1995		Brief amicus curiae of American Diabetes Association filed.
7	Nov 27 1995		Brief of respondent Federico F. Pena, Secretary of Transportation in opposition filed.
8	Dec 6 1995		DISTRIBUTED. January 5, 1996 (Page 15)
9	Jan 5 1996		Petition GRANTED. The brief of petitioner is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, February 16, 1996. The brief of respondents is to be filed with the Clerk and served upon opposing counsel on or before 3 p.m., Friday, March 15, 1996. A reply brief, if any, is to be filed pursuant to Rule 25.3. Rule 29.2 does not apply.
			**********
10	Feb 13 1996		Record filed.
		*	Original record proceedings United States District Court for the District of Columbia.
11	Feb 14 1996		Record filed.
		*	Partial record proceedings United States Court of Appeals for the District of Columbia Circuit.
12	Feb 16 1996		SET FOR ARGUMENT MONDAY, APRIL 15, 1996 (2ND CASE).
13	Feb 16 1996		Joint appendix filed.
14	Feb 16 1996		Brief of petitioner James Griffin Lane filed.
15	Feb 16 1996		Brief amici curiae of Association of Retired Persons, et al. filed.
16	Feb 16 1996		Brief amicus curiae of American Diabetes Association filed.
17	Mar 15 1996		CIRCULATED.
18	Mar 15 1996	X	Brief of respondents Federico F. Pena, Secretary of Transportation, et al. filed.
19	Apr 1 1996	X	Reply brief of petitioner James Griffin Lane filed.
20	Apr 15 1996		ARGUED.

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(1)

Supreme Court, U.S.
FILED

No. ___

95-365 SEP 5 - 1995

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District Of Columbia Circuit

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the D.C. Circuit correctly determined that Congress intended to exempt the federal government -- and only the federal government -- from paying damages for harm caused by its violations of Section 504 of the Rehabilitation Act, a conclusion directly contrary to prior rulings of the Ninth Circuit

PARTIES TO THE PROCEEDINGS

James Griffin Lane was the plaintiff in the district court and the appellant in the court of appeals. The defendants-appellees in the lower courts were Federico F. Pena, the Secretary of Transportation; Thomas Matteson, the Superintendent of the United States Merchant Marine Academy; and A.J. Herberger, the Administrator of the Maritime Administration.

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IN THE

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OCTOBER TERM, 1995

No. __

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District Of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

James Griffin Lane respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The June 2, 1995 and June 5, 1995 orders of the court of appeals are unreported and are reprinted in the appendix hereto. Appendix ("App.") 1a-4a. The December 22, 1994 order of the district court is unreported and is reprinted in the appendix hereto. App. 5a-10a. The October 26, 1994 memorandum opinion and order of the district court is reported at 867 F. Supp. 1050 and is reprinted in the appendix hereto. App. 11a-63a.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 504(a) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(a), provides in pertinent part:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

STATEMENT

In 1990, petitioner James Griffin Lane applied for and received an appointment to the United States Merchant Marine Academy ("the Academy" or "the USMMA"), a federal institution of postsecondary education in Kings Point, New York that trains its students to serve in the merchant marine of the United States. *See* Maritime Education and Training Act of 1980, 46 App. U.S.C. § 1295, *et seq.*[1] During his first year at the Academy, Lane was diagnosed as having diabetes mellitus and he reported this fact to the Academy's Chief Medical Officer. App. 15a-16a.

Just prior to his second year at the Academy, Lane began insulin therapy. After he informed the Academy of this development, the Superintendent of the Academy convened a Physical Examination Review Board

[1] The Academy is administered by the Maritime Administration ("MARAD"), an agency within the Department of Transportation App. 15a n.3.

("PERB") hearing to determine Lane's "medical suitability for continuance" at the USMMA. After the PERB verified Lane's status as an insulin-dependent diabetic, the Superintendent advised Lane on September 21, 1992 that this was a "disqualifying condition" and that he would therefore be separated from the Academy. On April 15, 1994, that decision was affirmed by the Administrator of MARAD, who agreed that Lane's condition "disqualifie[d]" him from further study at the Academy. App. 17a-19a.[2]

Lane subsequently filed suit in the district court alleging that the decision to disenroll him from the Academy violated Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504" or "the Act"), which forbids discrimination on the basis of disability against "otherwise qualified individual[s]" in connection with "any program or activity conducted by any Executive agency."[3] In addition to injunctive relief, Lane sought compensatory damages, including out-of-

[2] Lane was disenrolled from the Academy in December 1992, at the end of the fall semester of his second year. In January 1993, the MARAD Administrator ordered Lane to take a leave of absence pending further action in his case. More than a year later, in April 1994, the Administrator concluded that Lane's diabetes precluded his return to the Academy.

[3] The first sentence of Section 504(a) provides in full (with emphasis added):

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency or by the United States Postal Service*. [29 U.S.C. § 794(a)]

The emphasized language was added to the Act in a 1978 amendment. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982.

pocket costs, lost professional opportunities, and pain and suffering. Both parties moved for summary judgment. App. 12a.

In its October 26, 1994 opinion granting summary judgment in Lane's favor, the district court observed that "[i]t is undisputed that Section 504 is violated if (1) the claimant has a disability; (2) he or she was denied participation in a federal program because of the disability; and (3) he or she was otherwise 'qualified' for the program" and that the only "issue in the instant case is whether the Plaintiff was otherwise qualified to remain at the USMMA." App. 50a.[4] The district court then held that "the Defendants violated Section 504 of the Rehabilitation Act by disenrolling Lane solely on the basis of his diabetes and without making any attempt to reasonably accommodate his disability." *Id.* at 14a.

In support of this holding, the court observed that "[t]he Stipulated Facts reveal that James Griffin Lane has repeatedly achieved an 'outstanding' rating on the physical readiness exam administered by the Academy, that it is undisputed that James Griffin Lane may qualify for a merchant marine license if he maintains control of his diabetes, that his physician has reported that his diabetes mellitus is under 'extremely good control,' and that the Academy has allowed students in the past with a lost limb, a lost eye, brain damage, and color blindness to remain at the Academy and graduate despite their disabilities." App. 14a. The court also noted that "[i]t is undisputed that, aside from his diabetes, Lane is extremely well qualified to complete his education at the USMMA"; that "[i]t is undisputed that, if Lane continues to control his diabetic conditions, he will make a fine merchant marine officer"; and, finally, that upon "allowing Lane to graduate and become a merchant

[4] The government did not dispute that Lane's diabetes was a "disability" within the meaning of the Rehabilitation Act or that his condition was the sole basis for his disenrollment from the Academy.

marine officer * * * the government will likely benefit greatly from his service." *Id.* at 53a, 54a.

To remedy this violation of the Rehabilitation Act, the district court first ordered that Lane be reinstated in the Academy and be allowed to resume his maritime training. App. 57a.[5] The court then considered whether Lane was entitled to a compensatory damages remedy. The government argued that, although a plaintiff who prevails upon a Section 504 claim may recover money damages from other parties, sovereign immunity prohibits the recovery of such damages from a federal defendant. The district court, however, disagreed and held that "Congress intended to make federal agencies such as the DOT liable for money damages stemming from discrimination against the handicapped in their programs." *Id.* at 60a.

In so holding, the district court cited the fact that in 1978 Congress had amended the Rehabilitation Act to extend Section 504's prohibition against discrimination by federally-funded entities to include Executive Branch agencies. The court said that "the conclusion is inescapable" that the Act was amended so that "the federal government would be on equal footing with everyone else who discriminates against the handicapped." App. 60a (internal quotation marks omitted). The district court also said that it was "[p]ersuaded by the Ninth Circuit's reasoning" in *John Doe* v. *Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991). App. 60a. In *Doe*, the Ninth Circuit similarly "found that 'Congress waived sovereign immunity and provided a private right of action for damages for discrimination claims against the United States under section 504 of the Rehabilitation Act.'" App. 59a (quoting *Doe*, 941 F.2d at 799). Additionally, the district court cited *J.L. & K.P.* v. *Social Security*

[5] Lane returned to the Academy and resumed his studies in January 1995.

Administration, 971 F.2d 260 (9th Cir. 1992), in which "the Ninth Circuit affirmed its holding in *Doe*." App. 60a. Having determined that Lane was entitled to compensatory damages, the district court deferred resolution of the specific amount of damages to which Lane was entitled.[6]

On December 16, 1994, less than two months after the district court rendered its decision in this case, the D.C. Circuit held in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551, 1552 (1994), that there is no "private right of action for monetary damages against the federal government for violating § 504 of the Rehabilitation Act" and expressly disagreed with the Ninth Circuit's contrary holding in *Doe*. The *Dorsey* court observed that "[t]he Ninth Circuit, in *Doe* v. *Attorney General*, 941 F.2d 780 (9th Cir. 1991), decided this issue against the government. We reach the opposite conclusion on the ground that the government has not waived its sovereign immunity from such suits." 41 F.3d at 1552-53.

In the wake of *Dorsey*, on December 21, 1994 the parties submitted a joint stipulation to the district court on the issue of the government's liability to Lane for compensatory damages. App. 8a-10a. Specifically, the parties stipulated that *Dorsey* as controlling authority foreclosed Lane from recovering compensatory damages and that it would be proper for the district court to enter an order denying Lane's claim for damages on that basis. *Id.* at 9a. The parties also stipulated, however, that Lane would retain the right to pursue his entitlement to damages on appeal and that the amount of his damages was $75,000. *Id.* at 9a-10a. Of that amount, the parties

[6] The court noted that Lane "seeks three components of compensatory damages, including (1) out-of-pocket expenses that Lane and his family incurred to procure an alternative college education for Lane after he was disenrolled from the USMMA; (2) loss of professional opportunity damages due to the delay of Lane's entry into his chosen career as a merchant marine officer; and (3) damages for pain and suffering." App. 57a n.13.

stipulated that $50,000 represented his lost income attributable to delayed graduation; $15,000 represented his out-of-pocket expenses; and $10,000 represented his pain and suffering. *Id.* at 9a.

The district court thereafter entered an order on December 22, 1994 vacating its prior award of damages to Lane and entering judgment for the government solely on the issue of Lane's entitlement to damages. App. 5a-7a. In the order, the court observed (*id.* at 5a-6a):

> It is undisputed that the December 16, 1994 decision of the Court of Appeals for the D.C. Circuit in *Dorsey* v. *United States Dep't of Labor* forecloses an award of compensatory damages in favor of Plaintiff Lane. The *Dorsey* Court held that Congress has not waived its sovereign immunity to damages for discrimination claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended. *Id.* In contrast, relying in part on the Ninth Circuit's decisions in *Doe* v. *Attorney General*, 941 F.2d 780 (9th Cir. 1991) and *J.L.* [v.] *Social Security Administration*, 971 F.2d 260 (9th Cir. 1992), this Court found in its Order and Memorandum Opinion entered October 26, 1994 that Plaintiff Lane is entitled to compensatory damages against the Defendant as Congress has waived sovereign immunity to damages for discrimination claims under Section 504. As both parties agree, however, the *Dorsey* decision is controlling authority in this Circuit such that this Court must now enter judgment in favor of the Defendant on the issue of damages.

Lane appealed the district court's December 22, 1994 order to the D.C. Circuit, renewing his argument that he was entitled to recover damages from the government. Lane moved the court to hear the case in banc as an initial matter, explaining that in light of *Dorsey* it would be pointless to pursue full briefing and argument before a panel that would be bound by that decision. Relying on *Dorsey*, the government moved for summary

affirmance.[7] On June 2, 1995, in banc hearing was denied. App. 3a-4a. On June 5, 1995, a panel of the D.C. Circuit summarily affirmed on the basis of *Dorsey*. *Id.* 1a-2a.

REASONS FOR GRANTING THE PETITION

At issue in this case is a single question of law: whether Congress intended to exempt the federal government -- and only the federal government -- from any duty to pay for harm caused by its violations of Section 504 of the Rehabilitation Act. The Court should decide this question for three reasons: (1) the circuit courts are in conflict on the question; (2) the question is an important one potentially affecting the rights of millions of disabled persons as well as the efficacy of the Rehabilitation Act; and (3) there are substantial arguments that the court below resolved this important question incorrectly.

Before turning to the three reasons why this Court should agree to decide this question, it is appropriate to identify what is *not* at issue here. First, that Section 504 may be enforced by a private suit is not at issue. The government has not argued in this case that a private right of action does not exist under Section 504 and it is clear in any event that such a right of action does exist.[8]

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[7] The government did not challenge in the D.C. Circuit the district court's rulings with respect to the government's liability for violating the Rehabilitation Act or Lane's entitlement to injunctive relief. Although the government initially filed a notice of appeal from the district court's October 26, 1994 order regarding liability and injunctive relief, the government subsequently withdrew it.

[8] As this Court has often said, "the question of what remedies are available under a statute that provides a private right of action is 'analytically distinct' from the issue of whether such a right exists in the first place." *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60, 65-66 (1992) (quoting *Davis* v. *Passman*, 442 U.S. 228, 239 (1979)). Although this Court has never squarely ruled on the matter, it is settled law in the lower courts that

Second, that the government has violated Section 504 and that Lane is entitled to injunctive relief for that violation are also not at issue. The district court held that Lane's disenrollment from the Academy violated Section 504 and ordered that he be reinstated; the government did not appeal that ruling to the court of appeals.

Third, that compensatory damages are an available remedy in Section 504 actions against private entities or

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Section 504 may be enforced by a private right of action. *See, e.g.*, *Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 828 (4th Cir. 1994) ("[E]very circuit that has addressed this question, including this one, has held that a private right of action exists"); Note, *Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act*, 1986 Duke L.J. 197, 197 ("[F]ederal courts have uniformly agreed that an individual right of action is implied") (citing cases from ten circuits); Poston, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 504 Damages Issue*, 1992/1993 Ann. Survey Am. L. 419, 423-424 (same).

The operative language of Section 504 was based upon and is virtually identical to language found in Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, which bars discrimination on the basis of race. In *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), this Court held that Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) -- which forbids sex-based discrimination and which, like Section 504, was patterned after Title VI -- is enforceable through a private right of action. Thus, *Cannon* strongly suggests that Section 504 is privately enforceable. Indeed, in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (198-), which held that a Section 504 plaintiff can recover backpay, this Court acknowledged that lower courts have relied on *Cannon* "in holding that such a private right exists under § 504." *Id.* at 630 n.7.

Furthermore, both Section 505(b) of the Rehabilitation Act, 29 U.S.C. § 749a(b), which allows a prevailing party other than the United States to recover attorney's fees in "any action or proceeding to enforce or charge a violation of" Section 504, and the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7(a)(2), which speaks of "a suit against a State for a violation of" Section 504, clearly contemplate the existence of private suits to enforce Section 504. *Cf. Cannon*, 441 U.S. at 699-700.

state or local governments is likewise not at issue. That question was settled by this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992),[9] and the district court observed that the government "d[id] not contest" the fact that under *Franklin* such damages are available. App. 58a.[10]

Finally, that Lane has actually incurred damages because of the discrimination he endured, and the amount of those damages, are not in dispute. As noted previously, the government has stipulated that Lane has sustained damages in the amount of $75,000, an amount reflective of lost income, out-of-pocket expenses, and pain and suffering. App. 9a.

In sum, the only question in this case is whether Congress intended that Lane should be denied his

[9] In *Franklin*, this Court held that the implied right of action under Title IX -- the cause of action recognized in *Cannon* -- supports a claim for money damages. The Court reasoned that the traditional rule "that all appropriate relief is available in an action brought to vindicate a federal right when Congress has given no indication of its purpose with respect to remedies" also obtains in implied causes of action. *Franklin*, 503 U.S. at 68.

Although prior to *Franklin* there had been much debate in the lower courts about whether Section 504 plaintiffs could recover compensatory damages, every court of appeals to consider the issue since *Franklin* -- other than the D.C. Circuit in *Dorsey* and this case -- has held that such damages are available. *See Rodgers* v. *Magnet Cove Public Schools*, 34 F.3d 642, 643-645 (8th Cir. 1994); *Waldrop* v. *Southern Co. Services, Inc.*, 24 F.3d 152, 156-157 (11th Cir. 1994); *Pandazides*, 13 F.3d at 828-832 (overruling *Eastman* v. *Virginia Polytech. Inst. & State Univ.*, 939 F.2d 204 (4th Cir. 1991), a pre-*Franklin* decision which had held to the contrary); *see also Justice* v. *Pendleton Place Apartments*, 40 F.3d 139, 142-143 (6th Cir. 1994).

[10] In fact, the government conceded in the district court that *Franklin* "held that compensatory damages are available under Title IX, which bars sex discrimination by educational grant recipients, and is analogous to section 504." Memorandum in Opposition to Motion of Plaintiff James Griffin Lane for Summary Judgment 34.

undisputed damages simply and only because the wrongdoer was the federal government.[11] For the reasons that follow, this Court should resolve that question in this case.

I. THE COURTS OF APPEALS ARE IN CONFLICT OVER THE QUESTION WHETHER SECTION 504 AUTHORIZES SUITS FOR MONEY DAMAGES AGAINST THE FEDERAL GOVERNMENT

Both the D.C. Circuit and the Ninth Circuit have addressed the question whether the federal government must fully compensate victims of its own discrimination under Section 504. The Ninth Circuit has held that it must do so, as the district court initially did here. The D.C. Circuit, however, has expressly disagreed with the Ninth Circuit and applied its contrary rule in this case. This Court should grant certiorari to resolve this square conflict in the circuits.

In *John Doe* v. *Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991), plaintiff Doe was a physician and clinic director who alleged that the FBI had stopped sending its agents and applicants to the clinic for physical examinations because he had AIDS. The government argued in *Doe* that "the doctrine of sovereign immunity cloaks the FBI with immunity from a damages suit for violation of section 504 of the Rehabilitation Act," *id.* at 785, but the Ninth Circuit disagreed. The court noted initially that "[a] waiver of sovereign immunity 'cannot be implied but must be unequivocally expressed' by Congress." *Id.* at 788 (quoting *United States* v. *King*, 395 U.S. 1, 4 (1969)). Applying that test, the court held that in the

[11] In the court of appeals, the government noted that "[t]he parties agree that the only issue in this appeal is whether plaintiff may recover money damages under section 504 of the Rehabilitation Act for alleged disability discrimination in federal program [sic]." Motion for Summary Affirmance 1.

Rehabilitation Act "Congress unequivocally expressed its intent in the statute's language and history to provide handicapped victims of government discrimination a private right of action for damages against the government discriminator." 941 F.2d at 789.

As proof of this unequivocal expression, the Ninth Circuit pointed out that in 1978 Section 504 was amended to prohibit discrimination not only by federally-funded entities but also by "any program or activity conducted by any Executive agency or by the United States Postal Service." Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2955, 2982. Because prior to the amendment Congress "was aware * * * that the courts had interpreted section 504 to provide a private right of action for discrimination victims,"[12] the Ninth Circuit concluded that by "adding federal liability to a pre-existing section 504, Congress intended that there be no distinction in its enforcement against federal defendants." *Doe*, 941 F.2d at 789-790. The court further explained that "[i]n amending section 504, Congress made certain that federal agencies would be liable for violations of the statute. Congress's insertion of federal agencies in the pre-existing clause subjecting others to liability and its broad-brush remedy provision indicate that Congress intended that there be no distinction among section 504 defendants." *Id.* at 794.

The *Doe* court also supported its reading of the language and structure of the statute with legislative history. After reviewing the recorded deliberation of the House and the Senate that preceded the passage of the

[12] The Ninth Circuit so concluded based on "[t]he congressional debate on the amendment[ ]," 941 F.2d at 786, and the rule that it is "appropriate * * * to assume that Congress kn[ows] the then-existing state of the law," *id.* at 786 n.7 (citing *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982), and *Cannon* v. *University of Chicago*, 441 U.S. at 696-697).

1978 amendment to the Act, 941 F.2d at 791-792, the Ninth Circuit stated that "[t]wo things are starkly clear from the congressional debates. First, Congress intended to put the federal government on equal footing with everyone else in making it subject to section 504's prohibition of discrimination against the handicapped. Second, Congress intended to encourage private parties to pursue enforcement of [Section 504] through private rights of action." *Id.* at 792. These debates, the court said, "stress[ed] again and again that Congress's purpose in the section 504 amendment was to put the federal government on an equal footing with everyone else so that enforcement of the section would have no gaps. Congress stressed that this footing included a private right of action for damages." *Id.* at 794-795.

The Ninth Circuit reaffirmed the holding of *Doe* in *J.L. & K.P.* v. *Social Security Administration*, 971 F.2d 260 (1992). There, the Ninth Circuit confirmed that "*Doe* held that Congress, in enacting section 504, waived sovereign immunity and created a private cause of action against the government * * * [a]fter careful analysis of the statute's language and review of legislative history." 971 F.2d at 269 (citations omitted). The court in *J.L. & K.P.* also cited in support of *Doe* this Court's decision in *Franklin* v. *Gwinnett County Public Schools*, *supra*. *See* 971 F.2d at 264.

The holdings of the Ninth Circuit in *Doe* and *J.L. & K.P.* directly conflict with the holdings of the D.C. Circuit both in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (1994), and in this case, in which the court of appeals summarily affirmed on the basis of *Dorsey*.[13]

[13] This case is just as suitable for resolving the conflict between the Ninth and D.C. Circuits as *Dorsey* itself would have been had a petition for certiorari been filed there. That the D.C. Circuit summarily affirmed on the basis of *Dorsey* is not a reason to deny certiorari, as this Court has granted review in many such cases in recent years. *See, e.g.*, *Williamson* v. *United States*, 114 S. Ct. 2431, 2434 (1994); *Thomas Jefferson Univ.* v. *Shalala*, 114 S. Ct. 2381, 2386 (1994); *Ibanez* v. *Florida Dep't of Business & Prof.*

Indeed, *Dorsey* expressly acknowledged the conflict, saying that "[t]he issue in this appeal * * * is whether there is a private right of action for monetary damages against the federal government for violating § 504 of the Rehabilitation Act of 1973, as amended in 1978, 29 U.S.C. § 794. The Ninth Circuit in *Doe* v. *Attorney General*, 941 F.2d 780 (9th Cir. 1990), decided this issue against the government. We reach the opposite conclusion on the ground that the government has not waived its sovereign immunity from such suits." 41 F.3d at 1552-53.

The *Dorsey* court first observed that "[t]he federal government's waiver of sovereign immunity must be 'unequivocally expressed' and the statutory provision containing the expression must 'establish unambiguously that the waiver extends to monetary claims.'" *Id.* at 1555 (quoting *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992)). The *Dorsey* court then said that "[b]ecause a § 504 private right of action for damages -- against anyone -- must be judicially implied from a statute silent on the subject, Dorsey is unable to point to any explicit language in the Rehabilitation Act (or in Title VI) waiving the government's sovereign immunity. He therefore cannot prevail." *Id.*

The D.C. Circuit in *Dorsey* rejected *Doe*'s conclusion that the 1978 amendment to the Rehabilitation Act was an expression of Congress' intent to put the federal government on equal footing with other violators of the statute. "That damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing." *Dorsey*, 41 F.3d at 1555. The *Dorsey* court also

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Regulation, 114 S. Ct. 2084, 2088 (1994); *Howlett* v. *Birkdale Shipping Co.*, 114 S. Ct. 2057, 2061 (1994); *Farmer* v. *Brennan*, 114 S. Ct. 1970, 1976 (1994).

criticized the Ninth Circuit's use of legislative history in support of the finding of a waiver of sovereign immunity as being inconsistent with this Court's decision in *Nordic Village*. *See* 41 F.3d at 1555. The D.C. Circuit opined that "we believe the Ninth Circuit [in *Doe*] would have decided the case differently if it had had the benefit of the Supreme Court's later decision in *Nordic Village*." *Id.*

The court's speculation is, however, demonstrably false because the Ninth Circuit's decision in *J.L. & K.P.* -- which reaffirmed the holding of *Doe* -- was decided several months *after Nordic Village*. Furthermore, *Doe* did not violate the teaching of *Nordic Village*, which holds that a waiver of sovereign immunity cannot be grounded upon legislative history if the textual evidence of such a waiver is ambiguous. *See* 503 U.S. at 37. *Doe* based its finding of a waiver on "the language and structure of the statute" and only "buttresse[d]" its reading with legislative history. 941 F.2d at 791. Finally, *Nordic Village* did not announce a new standard for finding waivers of sovereign immunity but merely reaffirmed the traditional rule that such waivers must be "unequivocally expressed." That is the very standard that *Doe* applied. *See* 941 F.2d at 788.

In sum, there is a direct and irreconcilable conflict in the circuits concerning the federal government's liability for its violations of Section 504.

II. WHETHER DAMAGES CAN BE RECOVERED IN A SECTION 504 SUIT AGAINST THE FEDERAL GOVERNMENT IS A QUESTION OF CONSIDERABLE IMPORTANCE TO THE VICTIMS OF DISABILITY-BASED DISCRIMINATION AND TO THE REMEDIAL EFFICACY OF THE REHABILITATION ACT

The question presented in this case concerns the availability of compensatory damages in an entire category of civil rights cases -- *i.e.*, those arising under Section 504 of the Rehabilitation Act. The question

therefore potentially affects the rights of millions of disabled Americans. Furthermore, the question affects the remedial efficacy of the Act itself.

Allowing civil rights plaintiffs to recover damages serves two crucial purposes in any statutory scheme. First, it provides compensation for victims of prohibited discrimination for their injuries and, second, it deters future statutory violations. *See McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995); *United States* v. *Burke*, 504 U.S. 229, 241 n.12 (1992); *City of Riverside* v. *Rivera*, 477 U.S. 561, 575 (1986) (plurality); *Owen* v. *City of Independence*, 445 U.S. 622, 651-652 (1980). Those purposes are plainly impeded by the D.C. Circuit's conclusion that money damages are never available in suits brought under Section 504 against the government. Under that approach, the federal government need not make its victims whole, and it has no incentive to ensure that Section 504 is enforced. In this case, for example, all the government need do is belatedly readmit Lane to the Academy. It need not restore the two years of his professional life that he has lost, with its attendant costs.

Furthermore, the resulting unavailability of full remedies under Section 504 is of particular significance because the Rehabilitation Act is the *only* statute which provides redress for persons with disabilities who have suffered discrimination at the hands of an Executive Branch agency. The Americans With Disabilities Act of 1990 provides that no qualified individual with a disability shall be discriminated against by any "public entity," 42 U.S.C. § 12132, but the only federal entity to which that command applies is Amtrak. *See id.* § 12131(1). The Congressional Accountability Act of 1995, Pub. L. No. 104-1, 109 Stat. 3, meanwhile, only applies to Congress and congressional entities. *See* 2 U.S.C. § 1302(a)(10) (applying the Rehabilitation Act to "the legislative branch of the Federal Government"). In short, what is ultimately at stake in this case is whether

those who have been discriminated against on the basis of disability by Executive agencies can obtain *effective* relief and protection under the one statute that prohibits such discrimination.

III. THE D.C. CIRCUIT'S CONCLUSION THAT CONGRESS HAS NOT WAIVED SOVEREIGN IMMUNITY FROM SUIT UNDER SECTION 504 IS ERRONEOUS

In *Dorsey*, the D.C. Circuit said that it was unable to find "any explicit language in the Rehabilitation Act * * * waiving the government's sovereign immunity." 41 F.3d at 1555. The Ninth Circuit in *Doe* and *J.L & K.P.*, and the district court in this case, however, found such a waiver in the 1978 amendment to the Rehabilitation Act, which they viewed as a deliberate attempt to put the federal government on "equal footing" with other discriminators. *Dorsey*'s rejection of that theory was a product of its failure to consider the context in which the 1978 amendment was adopted.

It is true that waivers of sovereign immunity must be "unequivocally expressed." At the same time, however, such waivers do not require any particular form of words. As this Court has explained, "waiver of sovereign immunity is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained with reference to underlying congressional policy." *Franchise Tax Bd. of Calif.* v. *United States Postal Service*, 467 U.S. 512, 521 (1984) (quoting *Keifer & Keifer* v. *Reconstruction Finance Corp.*, 306 U.S. 381, 389 (1939)).[14] Accordingly, in determining whether a waiver of sovereign immunity has been made, it is necessary to

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[14] In the similar context of congressional abrogation of State Eleventh Amendment immunity, this Court has said that "no magic words are required for abrogation." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989).

examine a statutory text with an eye toward the reason for its enactment.

Prior to its amendment in 1978, Section 504 did not apply to the federal government at all but only to programs or activities conducted by recipients of federal funds. The 1978 amendment, which added the language forbidding discrimination "by any Executive agency or by the United States Postal Service," was largely a reaction to a Department of Justice opinion dated September 23, 1977, which declared the federal government exempt from the statute. *See* 1 Op. Off. Legal Counsel 210 (1977). In promulgating regulations implementing the Rehabilitation Act, the Department of Transportation has itself recognized that "the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, [was] that the Federal Government should have *the same section 504 obligations as recipients of Federal financial assistance*." 56 Fed. Reg. 37292 (1991) (emphasis added).[15]

Thus, the 1978 amendment was intended, quite simply, to subject Executive agencies that discriminate on the basis of disability to the same legal remedies that would be available against other discriminators. As the *Doe* court pointed out, Congress was aware in 1978 that Section 504 had been construed as authorizing a private right of action for damages. *See Doe*, 941 F.2d at 786. Furthermore, the 1978 amendment placed Executive agencies on a par not only with private entities but also with the Postal Service, an institution as to which sovereign immunity has plainly been waived. *See Loeffler* v. *Frank*, 486 U.S. 549 (1988); *Franchise Tax Bd. of Calif.* v. *United States Postal Service*, *supra*.

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[15] In language that parallels Section 504, the Department of Transportation's own regulations prohibit discrimination on the basis of disability "under any program or activity conducted by the Department." 49 C.F.R. § 28.130(a). The regulations expressly include the Maritime Administration within their ambit. *See id.* § 28.103(i).

That the 1978 amendments must be read as creating a cause of action for money damages against the federal government is further confirmed by a statement made in 1992 by Senator Jeffords, the primary author of the 1978 amendments. Senator Jeffords observed that it was "the intent of Congress in 1978 to cover the Federal Government with the same antidiscrimination mandate which is applied to private recipients of Federal financial assistance" and therefore "[t]here can be no doubt that the 1978 amendments to section 504 provided a private right of action for victims of discrimination by the Federal Government." 138 Cong. Rec. S16609 (daily ed. Oct. 5, 1992). And referring by name to the *Doe* and *J.L. & K.P.* decisions, Senator Jeffords said that the Ninth Circuit has "correctly [held] that 'Congress in enacting section 504, *waived sovereign immunity* and created a private cause of action against the Government." *Id.* (quoting *J.L. & K.P.*, 971 F.2d at 269; emphasis added). He explained that "[i]t would be a disgrace to allow a private right of action against private entities receiving Federal financial assistance, but to deny *the same remedy* against the Federal Government when it discriminates." *Id.* (emphasis added). Finally, Senator Jeffords declared that "[t]here is no need to amend the Rehabilitation Act to provide a private right of action against the Federal Government as some have suggested. The language of the 1978 amendments is sufficient on its face to confer such a private right of action." *Id.*

Furthermore, wholly apart from the 1978 amendments, that compensatory damages are recoverable in Section 504 suits against the federal government is clear from the Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845, 42 U.S.C. § 2000d-7. In that statute, Congress abrogated the States' Eleventh Amendment immunity under several statutes, including the Rehabilitation Act. A subsection of the 1986 Act provides that "[i]n a suit against a State for a violation of [Section 504], remedies (including remedies both at law

and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in [a] suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2). This language confirms that compensatory damages -- "remedies at law" -- are available in suits against States under Section 504. *See Franklin*, 503 U.S. at 78 (Scalia, J., concurring in the judgment). More importantly, by expressly providing that the same remedies available against States are available against "*any* public * * * entity other than a State" (emphasis added), this language also confirms that damages are available in suits against the federal government.

Accordingly, in the 1978 and 1986 amendments to the Rehabilitation Act, Congress expressed in clear terms that the federal government is liable in damages when it violates the rights of disabled Americans. Indeed, it would be anomalous to conclude otherwise, *i.e.*, that Congress intended the federal government -- and only the federal government -- to be immune from its wrongdoing under the Rehabilitation Act. As the district court said in this case, there is "no reason to conclude that Congress intended to exclude rights or remedies as against the federal government when it gave the courts broad authority to enforce its statutory provisions requiring reasonable accommodation for the handicapped." App. 60a.

This Court's recent decision in *Franklin* v. *Gwinnett County Public Schools*, *supra*, casts further doubt upon the correctness of the D.C. Circuit's disallowance of compensatory damages. In *Franklin*, this Court held that money damages may be recovered in a suit brought under Title IX and strongly reaffirmed the traditional rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award *any* appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71 (emphasis

added).[16] This rule, the Court said, is "well settled" and "has deep roots in our jurisprudence." *Id.* at 68, 66.

In tracing the roots of this rule, the first four American cases cited by this Court all involved suits against the federal government or federal actors. *See Franklin*, 503 U.S. at 66-67. The Court started by quoting *Bell* v. *Hood*, 327 U.S. 678, 684 (1946) -- which involved a suit against agents of the FBI -- to the effect that "where legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." The *Franklin* Court next cited *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), which involved a suit against the Secretary of State. *Franklin* also quoted the statement in *Dooley* v. *United States*, 182 U.S. 222, 229 (1901), that "a liability created by a statute without a remedy may be enforced by a common-law action."[17] But perhaps most revealing was *Franklin*'s reliance upon *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838).

As recounted in *Franklin*, *Kendall* involved "an act of Congress that accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but which did not specify the precise remedy available to the carriers." 503 U.S. at 67. *Kendall* held that the mail carriers were entitled to payment from the government on the ground that it would be "a monstrous absurdity" to give the carriers a right without that

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[16] *Franklin* quoted (503 U.S. at 67) the following explanatory passage from *Texas & Pacific R. Co.* v. *Rigsby*, 241 U.S. 33, 39 (1916):

> A disregard of the command of [a] statute is a wrongful act, and where it results in damage to one of the class for whose especial benefit the statute was enacted, the right to recover damages from the party in default is implied, according to a doctrine of the common law.

[17] *Dooley* was also cited in *Bell* v. *Hood*, 327 U.S. at 684 n.7, in support of the statement quoted in *Franklin*.

remedy. 37 U.S. at 624. In reaching this holding, the Court rejected the view of Attorney General Butler that sovereign immunity barred the relief sought. He had contended that because "[t]he United States are the real party defendants; the object of the suit being to cancel balances in the treasury books, and to reach public moneys in the treasury," the suit is subject to "the general objection, that the government is not suable, except when it chooses to waive its immunity in this respect." *Id.* at 587. Significantly, the *Franklin* Court cited *Kendall* for the proposition that the federal judiciary's authority to award all appropriate relief -- including damages -- "historically has been thought necessary to provide an important safeguard against abuses of *legislative and executive* power." 503 U.S. at 74 (emphasis added). It is just such an abuse of government power that is at issue in this case.

These cases -- particularly *Bell* v. *Hood*, *Kendall*, and *Franklin* itself -- are all contrary to the result reached by the D.C. Circuit here. Indeed, the Ninth Circuit in *J.L. & K.P.* and the district court here cited *Franklin* in support of their holdings. *See J.L. & K.P.*, 971 F.2d at 264; App. 58a.

Finally, it is noteworthy that *Franklin* was handed down just one day after *Nordic Village* -- the case on which the D.C. Circuit placed so much emphasis -- and that the Court in *Franklin* nowhere qualified its holding in light of *Nordic Village*. Accordingly, based upon *Franklin*, and the language and purpose of the statute, there are substantial arguments that compensatory damages are an "appropriate" form of relief authorized by Congress in a suit brought against the federal government under Section 504.

* * *

In sum, there is a direct conflict in the courts of appeals on the issue raised in this case; the issue is one of clear importance; there are substantial arguments that

the court below decided the issue incorrectly; and the issue raises questions about the proper scope of and relationship between this Court's decisions in *Franklin* and *Nordic Village*. Accordingly, this court should grant the petition and resolve the split in the circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

[Filed June 5, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5006 September Term, 1993
94cv01608

James Griffin Lane,

Appellant

v.

Federico F. Pena, in his official capacity as Secretary of the United States Department of Transportation, *et al.*

BEFORE: Silverman, Sentelle, and Henderson, Circuit Judges

ORDER

Upon consideration of the motion for summary affirmance, it is

ORDERED that the motion be granted. The merits of the parties' positions are so clear as to warrant summary action. *See Taxpayers Watchdog, Inc. v. Stanley*, 819 F.2d 294, 297 (D.C. Cir. 1987) (per curiam); *Walker v. Washington*, 627 F.2d 541, 545 (D.C. Cir.) (per curiam), *cert. denied*, 449 U.S. 994 (1980).

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. *See* D.C. Cir. Rule 41.

Per Curiam
/s/ LHS
/s/ DBS
/s/ KLH

APPENDIX B

[Filed June 2, 1995]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 95-5006 September Term, 1994

James Griffin Lane,

Appellant

v.

Federico F. Pena, et al.

Appellees

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellant's Suggestion For Initial Hearing *In Banc* and alternative request for summary affirmance have been circulated to the full Court. No member of the Court requested the taking of a vote thereon. Upon consideration of the foregoing, it is

ORDERED, by the Court *in banc*, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

By: /s/ Robert A. Bonner

Robert A. Bonner
Deputy Clerk

Circuit Judge Tatel did not participate in this matter.

APPENDIX C

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE, Plaintiff, v. FEDERICO PENA, et al., Defendants.	Civil Action No. 94-1608

ORDER

On December 21, 1994, the Court held a status conference in the above-captioned case pursuant to Rule 16 of the Federal Rules of Civil Procedure.

At that time, the Court had before it a Stipulation by the parties, a copy of which is attached hereto, regarding the resolution of the issue of damages in the above-captioned case. The Court directed the parties to meet and confer and jointly submit a proposed Order which would memorialize the terms and conditions of said Stipulation insofar as they alter the court's judgment entered on October 26, 1994 in the above-captioned case. Unfortunately, the parties have been unable to reach an agreement as to the Court's instructions at the status conference. Accordingly, each party submitted separate proposed Orders, neither of which the Court shall adopt.

It is undisputed that the December 16, 1994 decision of the Court of Appeals for the D.C. Circuit in *Dorsey v. United States Dep't of Labor*, No. 93-5080, 1994 WL

900831 (D.C. Cir. December 16, 1994), forecloses an award of compensatory damages in favor of Plaintiff Lane. The *Dorsey* Court held that Congress has not waived its sovereign immunity to damages for discrimination claims under Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794, as amended. *Id.* In contrast, relying in part on the Ninth Circuit's decisions in *Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1991) and *J.L. Social Security Administration*, 971 F.2d 260 (9th Cir. 1992), this Court found in its Order and Memorandum Opinion entered on October 26, 1994 that Plaintiff Lane is entitled to compensatory damages against the Defendant as Congress has waived sovereign immunity to damages for discrimination claims under Section 504. Order entered October 26, 1994 at 60. As both parties agree, however, the *Dorsey* decision is controlling authority in this Circuit such that this Court must now enter judgment in favor of the Defendant on the issue of damages.

The parties cannot agree, however, as to the Court's position at the status conference regarding the Plaintiff's Motion to Supplement Record, filed December 21, 1994. In said motion, the Plaintiff requests that this Court receive into the record certain evidentiary information regarding the stipulated amount of the Plaintiff's damages -- which he is not now entitled to recover under *Dorsey*. Counsel for the Defendant represented that she has not had the opportunity to review the motion, but would likely be filing an opposition thereto. Pursuant to her request, the Court afforded her until 4:00 p.m. on January 13, 1995 in which to file any opposition.

At the status conference, the Court further advised counsel that the Court's approval or disapproval of the Plaintiff's motion may not be appropriate or necessary in view of the fact that the motion and its attachments have been filed with the Court and made a part of the official jacket in this case. Moreover, the Court confirmed that the Plaintiff seeks to supplement the record through his

motion solely for purposes of appellate review on the issue of damages. These comments by the Court did not, however, constitute a ruling on the Plaintiff's motion, as counsel for the Plaintiff appears to have concluded. The Court took the matter under advisement pending receipt of the Defendant's responsive pleading. However, the Court takes this opportunity to emphasize its wish that counsel resolve such relatively minor matters amongst themselves, without unnecessarily invoking the limited time and resources of this Court.

Accordingly, it is, by the Court, this 22nd day of December, 1994,

ORDERED that the Defendant may file a response to the Plaintiff's Motion to Supplement Record on or before 4:00 p.m. on January 13, 1995; and it is

FURTHER ORDERED that this Court's Order of October 26, 1994 shall be, and hereby is VACATED only to the extent that it awards damages to the Plaintiff; and it is

FURTHER ORDERED that judgment shall be, and hereby is, ENTERED in favor of the Defendant solely on the issue of the Plaintiff's entitlement to damages.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE, Plaintiff, v. FEDERICO PENA, et al., Defendants.	Civil Action No. 94-1608 (CRR)

JOINT STIPULATION OF PLAINTIFF AND DEFENDANTS REGARDING DEFENDANTS' LIABILITY FOR DAMAGES

COME NOW all parties to this case -- plaintiff James Griffin Lane, and defendants Federico Pena, et al. -- and, in the interest of an expeditious resolution of such issues, hereby submit this Joint Stipulation regarding defendants' liability for damages.

On October 26, 1994, the Court issued an order granting Plaintiffs Motion for Summary Judgment, denying the Defendants' Motion to Dismiss or, in the Alternative, for Summary Judgment, and entering judgment for the Plaintiff. The Court's October 26 Order required defendants to reinstate plaintiff to the United States Merchant Marine Academy (the "Academy"), and further stated that plaintiff Lane "is entitled to compensatory damages against the Defendants, as Congress has waived sovereign immunity to damages for discrimination claims under Section 504 [of the Rehabilitation Act of 1973, 29 U.S.C. section 794, as amended]." October 26, 1994 Order at 60.

On December 16, 1994, a panel of the U.S. Court of Appeals for the District of Columbia Circuit issued a decision addressing the liability of the United States for compensatory damages under Section 504, and held that Congress has not waived sovereign immunity to damages for discrimination claims under Section 504. *See Dorsey v. United States Department of Labor*, No. 93-5080, 1994 WL 700831 (D.C. Cir. December 16, 1994).

In light of the foregoing, the parties to this case hereby stipulate to the following matters as to which there is no dispute.

1. The *Dorsey* decision currently is controlling authority in this Circuit, and at present forecloses an award of compensatory damages in favor of plaintiff Lane.

2. The amount of plaintiff Lane's damages, which he is not now entitled to recover because of the ruling in *Dorsey*, is $75,000. Of this amount, $50,000 represents lost income attributable to delay of Mr. Lane's scheduled graduation from the Academy and thus, of his post-graduation employment; $15,000 represents out-of-pocket expenses incurred by Mr. Lane for tuition and other related expenses incurred by him between the time of his separation from the Academy in December 1992 and the impending resumption of his studies at the Academy in January 1995; and $10,000 represents pain and suffering.

3. The parties also agree that it is proper for the Court to issue an Order acknowledging the controlling effect of *Dorsey* and denying Mr. Lane's claim for damages on that basis. The parties intend to submit by December 21, 1994 separate papers containing their suggestions regarding the proper form and substance of such an Order.

4. In the event plaintiff does not prevail on the issue of damages on appeal, both parties will bear their own fees and costs on the damages issue.

5. This agreement is without prejudice to plaintiff's right to seek reinstatement of the Court's view of his entitlement to damages (in the amount stipulated to in paragraph 2 above) in any appellate court.

Respectfully submitted,

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Dated: December 21, 1994

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE,

Plaintiff,

v. Civil Action No. 94-1608

FEDERICO PENA, *et al.*,

Defendants.

MEMORANDUM OPINION OF CHARLES R. RICHEY UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFF: Walter A. Smith, Jr., along with Daniel B. Kohrman, Timothy J. Carlson, and Mitchell E. Zamoff, of Hogan & Hartson, Washington, D.C. Of Counsel: Arthur B. Spitzer, of the American Civil Liberties Union of the National Capital Area, Washington, D.C.

FOR THE DEFENDANTS: Frank W. Hunger, Assistant Attorney General, Eric H. Holder, Jr., United States Attorney, along with Brian G. Kennedy and Patricia M. Russotto, of the Department of Justice Civil Division Federal Programs Branch, Washington, D.C.

INTRODUCTION

Before the Court in the above-captioned case are the parties' cross-Motions for Summary Judgment, as well

as their oppositions and replies thereto. This case was originally filed as a preliminary injunction. On July 28, 1994 the Court held a hearing and issued an Order on August 1, 1994 which, with the parties' consent, consolidated a hearing on the Plaintiff's Motion for Preliminary Injunction with a final determination on the merits of the case, pursuant to Rule 65 of the Federal Rules of Civil Procedure. The parties informed the Court that there would be no dispute as to material facts and that the matter could be resolved through cross-motions for summary judgment. On September 29, 1994, the Court held a hearing on the parties' cross-motions for summary judgment.

The Plaintiff filed a preliminary injunction seeking reinstatement to the United States Merchant Marine Academy ("USMMA" or "Academy"). He was admitted to the Academy in July of 1991. Thereafter he developed diabetes but managed to complete his first year. In September of 1992, the Academy informed him that he would be disenrolled due to his medical condition. The Plaintiff argues that the Defendants' actions violate both the Maritime Education and Training Act of 1980, 46 App. U.S.C. § 1295 ("META"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq*. ("Section 504"). In his motion, the Plaintiff seeks a preliminary and permanent injunction requiring the Academy to reinstate Lane immediately, compensatory damages, including out-of-pocket costs, loss of professional opportunity, and pain and suffering, attorneys' fees, and costs.

The Defendants argue, in sum, that the META imposes on USMMA graduates an obligation to serve in an armed forces reserve unit upon graduation as a condition of receiving an education at the Academy. The Defendants contend that the Plaintiff cannot satisfy his reserve service obligation because he has insulin-dependent diabetes mellitus and, therefore, does not meet the physical standards established by the Department of Defense for a

commission in the armed forces reserve. According to the Defendants, the Plaintiff cannot satisfy an essential statutory requirement as a condition of attending the Academy and, therefore, he cannot be considered an "otherwise qualified person with a disability" for purposes of Section 504 of the Rehabilitation Act. The Defendants further argue that the agency's interpretation of the statute warrants due deference by the Court, and assert sovereign immunity with respect to damages.

Alternatively, the Plaintiff argues, in sum, that the META nowhere authorizes the *per se* exclusion of a student simply because he has a medical condition which precludes admission into the naval reserve, when that same condition in no way limits the student's ability to serve in the merchant marine.[1] He further argues that the META mandates only that students qualify for a merchant marine license -- not that they also qualify to serve in the naval reserve -- and contends that he is eligible for a merchant marine license. Moreover, the Plaintiff maintains that the Court need not afford the agency deference because it has not consistently followed their alleged practice of disenrolling cadets who fail to meet the requirements for a naval reserve commission, and because the plain language of the META demonstrates that no such practice is required. Finally, the Plaintiff asserts that Section 504 was also violated because he was denied the opportunity to complete his education at a federally funded academic institution solely because he developed a disability.

Upon careful consideration of the papers filed by both parties for dispositive relief, the oral arguments of counsel, the applicable law, and the entire record in this case,

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[1] The Plaintiff does not challenge the Department of Defense's determination that diabetes mellitus prevents an individual from meeting requisite physical qualifications for participation in the armed forces reserve. He only argues that eligibility for the reserve is not a requirement for continued enrollment in the Academy, and that he meets all necessary requirements.

the Court has determined that the Plaintiff's Motion shall be granted, and the Defendants' Motion shall be denied.

The Court finds that the Defendants violated Section 504 of the Rehabilitation Act by disenrolling Lane solely on the basis of his diabetes and without making any attempt to reasonably accommodate his disability. The Stipulated Facts reveal that James Griffin Lane has repeatedly achieved an "outstanding" rating on the physical readiness exam administered by the Academy, that it is undisputed that James Griffin Lane may qualify for a merchant marine license if he maintains control of his diabetes, that his physician has reported that his diabetes mellitus is under "extremely good control," and that the Academy has allowed students in the past with a lost limb, a lost eye, brain damage, and color blindness to remain at the Academy and graduate despite their disabilities. Nevertheless, the Defendants now refuse to acknowledge that the Rehabilitation Act requires any reasonable accommodation -- or even an attempt to provide reasonable accommodation -- of Lane's diabetes mellitus. The Court simply cannot accept this untenable reading of the Rehabilitation Act. The Court thus finds that the Defendants have not shown that Lane has failed to meet an essential program requirement under Section 504 or, critically, that the Academy would suffer undue hardship by reasonably accommodating the diabetes mellitus of this otherwise extremely well qualified cadet.

The Defendants argue that the META dictated their disenrollment of Lane. However, the Court further finds that the plain language of the META does no such thing. Neither the statute, the regulations promulgated thereunder, nor the agency's inconsistent practices support the Defendants' position that the Academy was obliged to disenroll Lane upon discovery of his diabetes mellitus. The Court finds that, despite the Defendants' assertions to the contrary, the META contains no requirement that cadets such as Lane meet all physical requirements for a commission in the armed forces reserve or suffer

unconditional expulsion from the Academy. Moreover, the Court finds that the agency's reading of the META does not warrant due deference because it is contradicted by the plain language of the statute, and because the USMMA has acted inconsistently with respect to Lane and other disabled students.

Accordingly, the Court shall order the United States Merchant Marine Academy to reinstate forthwith Plaintiff James Griffin Lane as a student at the USMMA, and shall require the Defendants to take all steps necessary to permit Lane to resume his maritime training as soon as practicable. Finally, the Court finds that the Plaintiff is entitled to compensatory damages for his injuries.

As a result of the Court's findings, judgment must be entered in favor of the Plaintiff. The Court shall issue an Order of even date herewith consistent with this Memorandum Opinion.

BACKGROUND[2]

In 1990, the Plaintiff, James Griffin Lane, applied for an appointment to the U.S. Merchant Marine Academy, a federal service academy that trains men and women to serve as commercial merchant marine officers and as commissioned officers in the United States armed forces.[3] As a condition of his appointment, the Plaintiff was required to undergo a physical examination to determine if he met the requisite physical qualifications. On November 29, 1990, the Department of Defense Medical Examination Review Board ("DODMERB") administered the examination. Two days earlier, the Plaintiff had submitted a medical history form which asked whether he had at any time "blood, protein, or

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[2] Pursuant to the Court's Order of August 1, 1994, the parties filed a Stipulated Statement of Undisputed Material Facts.

[3] The Maritime Administration ("MARAD"), within the Department of Transportation ("DOT" or "the agency"), administers the USMMA.

sugar in urine"; to this, he answered "no." The results of a urinalysis test administered later by DODMERB were "negative" for sugar in the urine.

On June 4, 1991, DODMERB stamped on the Plaintiff's medical evaluation form that he was "medically qualified" and "recommended for service academies and ROTC programs," and the Plaintiff entered the Academy the next month.

On February 1, 1991, Lane consulted a private family physician and reported excessive thirst and hunger. A test showed he had an elevated blood sugar level, and the doctor directed the Plaintiff to limit his intake of calories and take an oral hypoglycemic medication to reduce his blood sugar level. Over a period of seven weeks, Lane's blood sugar level fluctuated between the normal range and higher. In September or October of that year, the Plaintiff had the flu and began to lose weight and again experience excessive thirst and hunger. In December 1991, the Plaintiff was diagnosed with diabetes mellitus by Dr. Didace Kabatsi, a private endocrinologist, who performed several tests on blood and urine samples.

On February 11, 1992, Lane visited Dr. Daniel Kalash, Chief Medical Officer at the Academy, who recorded in his notes that the Plaintiff advised that he had an "intermittent history during [the] past several months of glycosuria [sugar in the urine] and [elevated] blood sugar" and that he had been treated for his condition. He further recorded that the Plaintiff reported he was monitoring his "blood sugar in [his] barracks" and that "all findings [were] normal." Finally, he made the following notes: "Assess: Early Diabetes type I" and "Capt. Bauer notified & communicated problem to BuMed." At that time, Bauer was the Head of the Department of Naval Science at the Academy. Dr. Kalash instructed the Plaintiff to continue observing his blood sugars and report abnormalities and symptoms, and told him that he would repeat

the lab workup at the end of the Plaintiff's third class, or sophomore year.

In March 1992, the Plaintiff consulted Dr. Jay Skyler, an endocrinologist at the University of Miami, and President of the American Diabetes Association. Dr. Skyler confirmed that Lane had diabetes, recommended insulin therapy, and referred him to Dr. S. Mark Tanen, an endocrinologist in Northern Virginia. In early July 1992, shortly before commencing his second year, the Plaintiff began seeing Dr. Tanen and, upon Dr. Tanen's recommendation, began insulin therapy.

In a letter dated July 23, 1992, the Plaintiff's father, J.W. Lane, Jr., notified Paul Krinsky, the Superintendent of the Academy, that his son had began taking insulin to control his diabetes. On September 4, 1992, the Plaintiff learned that a Physical Examination Review Board ("PERB") hearing had been scheduled for September 8, 1992 to determine his "medical suitability for continuance" at the Academy. The hearing was to confirm that the Plaintiff had insulin-dependent diabetes mellitus, as indicated in his father's July 23, 1992 letter. At the hearing, which Lane attended unaccompanied, the PERB did not evaluate the particular circumstances of Lane's case other than verify his status as a diabetic.

On September 16, 1992, the PERB advised the Superintendent of the Academy that the Plaintiff had insulin-dependent diabetes and that, under U.S. Navy commissioning standards, this was "a disqualifying condition for military service" and, accordingly, that the Plaintiff "would not be commissionable in the Navy/Merchant Marine Reserve Program." The PERB further advised, however, that Lane may not be ineligible for a Coast Guard merchant marine license as the "requirements do not seem to be as rigid as the Navy requirements but a waiver is required when an applicant is insulin-dependent and may not be automatic[;] it would depend on the specifics of the condition."

In contrast to the Department of the Navy, the United States Coast Guard grants merchant marine licenses, including those which permit holders to serve as deck officers at sea, to persons with diabetes mellitus who obtain a waiver of Coast Guard physical qualifications standards with respect to diabetes. Waivers are issued to individuals who show to the Coast Guard's satisfaction that their diabetes is under control and that they are otherwise physically qualified for a merchant marine license. As of December 1993, more than fifty persons with diabetes, some insulin-dependent, are sailing on an active merchant marine license.

On September 21, 1992, the Superintendent advised the Plaintiff that he would be separated from the Academy effective December 18, 1992, and stated that "Adult-onset (Type I) diabetes is a disqualifying condition for military service. You are not eligible for appointment as Midshipman, MMR/USNR nor for commissioning as a Naval Reserve Officer." The Superintendent advised Lane that he would be permitted to continue to take classes at the Academy through December 18, 1992, and thus complete the first half of his sophomore year. This did not include participation in shipboard training, however.

Lane achieved a 3.4 grade point average during his first year at the Academy, rowed crew, and participated in various sea-going activities, including a four to five day journey up the East Coast in a tugboat, during which storm conditions caused the boat to undergo 40 degree rolls. The Plaintiff's medical records contain no indication that he had any medical problems associated with these activities, and in November 1992, Lane achieved an "outstanding" rating on the physical readiness exam administered by the Academy, as he had achieved each time it was administered previously. In December 1992, Dr. Tanen concluded that Lane's diabetes was under "extremely good control" and noted that he had not

experienced any incapacitating episodes due to his condition.

In early October 1992, the Plaintiff's father wrote to Captain Warren G. LeBack, then-Administrator of the U.S. Maritime Administration ("MARAD"), to challenge the Superintendent's decision. In a letter dated January 15, 1993, LeBack responded to the Plaintiff's request for a review of the decision, and between January 15, 1993 and April 15, 1994, the Plaintiff took steps to obtain the assurances specified in the January 15, 1993 letter.

On April 15, 1994, MARAD Administrator A.J. Herberger issued a letter to Lane stating, in part, that Lane could not meet physical qualifications standards applicable to midshipmen at the USMMA because "insulin dependent diabetes disqualifies an individual from receiving a commission in any component of the reserve of the armed forces of the United States."

The Department of the Navy has consistently applied the same physical qualifications standards with respect to diabetes mellitus, which is a disqualifying condition for commissioning in all active duty and reserve units of the armed forces. In recent years, however, students have attended and graduated from the Academy despite having developed physical disabilities while they were students, which include loss of a limb, loss of an eye, brain damage, and color blindness. Moreover, students with insulin-dependent diabetes have enrolled in and recently graduated from at least one state maritime academy, the Maine Maritime Academy.

STATUTES AND REGULATIONS APPLICABLE TO THIS CASE

The Plaintiff claims violations of both the Maritime Education and Training Act of 1980, 46 App. U.S.C. § 1295 ("META"), and Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. § 794 *et seq.* ("Section 504").

I. The META

In the META, Congress assigned the United States Merchant Marine Academy a two-fold mission: "education and training of citizens of the United States who are capable of providing for the safe and efficient operation of the merchant marine of the United States at all times and as a naval and military auxiliary in time of war and national emergency." 46 U.S.C. App. § 1295(1). Moreover, the statute directs the Secretary of Navy, in cooperation with the Maritime Administrator, to assure that the training of merchant marine officers at the USMMA includes programs for "naval science training in the operation of merchant marine vessels," and that the programs be "consistent with United States Navy standards and needs." *Id.* § 1295(2). The Plaintiff claims that the Academy's primary mission is to serve the merchant marine, and that its secondary goal is to serve as naval and marine reserve. Thus, he contends, Congress did not categorically require that all students at all times meet naval reserve requirements, only that they at all times meet merchant marine requirements. The Defendants argue that both purposes are primary and that, therefore, the Plaintiff's inability to meet requisite physical qualifications for naval reserve status precludes him from continuing at the USMMA.

The Court finds, however, that this statutory language does not clearly lead to either conclusion. It is undisputed that Congress anticipated that the USMMA would serve both the merchant marine and the armed forces reserve. The obligations Congress imposed on cadets at the USMMA with respect to each, however, are covered by other portions of the statute. The Court thus observes that the extent of these obligations is the seminal issue posed by this dispute.

The parties' main contention is over three portions of the statute which explicitly deal with the armed forces reserve. The statute requires that "[a]ny citizen of the

United States selected for appointment . . . *must agree to apply for midshipman status in the United States Naval Reserve* (including the Merchant Marine Reserve, United States Naval Reserve) before being appointed as a cadet at the Academy." 46 U.S.C. App. § 1295b(b)(3)(F) (emphasis added). The final authority to appoint cadets to a reserve post lies with the Secretary of the Navy:

> Any citizen of the United States who is appointed as a cadet at the Academy *may be appointed by the Secretary of the Navy as a midshipman in the United States Naval Reserve* (including the Merchant Marine Reserve, United States Naval Reserve).

46 U.S.C. App. § 1295b(c) (emphasis added).

The key statutory language at issue in this case, however, deals with a cadet's commitment agreements once he or she is appointed:

> Each individual appointed as a cadet at the Academy . . . who is a citizen of the United States, shall as a condition of appointment to the Academy sign an agreement committing such individual --
>
> (A) to complete the course of instruction at the Academy, unless the individual is separated by the Academy;
>
> (B) to fulfill the requirements for a license as an officer in the merchant marine of the United States on or before the date of graduation from the Academy of such individual;
>
> (C) to maintain a license as an officer in the merchant marine of the United States for at least 6 years following the date of graduation from the Academy of such individual;
>
> (D) *to apply for an appointment as, to accept if tendered an appointment as, and to serve as a commissioned officer in the United States Naval Reserve* (including the Merchant Marine Reserve, United States Naval Reserve), the United States

Coast Guard Reserve, or any other Reserve unit of an armed force of the United States, for at least 6 years following the date of graduation from the Academy of such individual; and

(E) to serve in the foreign or domestic commerce and the national defense of the United States for at least 5 years following the date of graduation from the Academy

(i) as a merchant marine officer;

(ii) as an employee of the United States maritime industry, if the Secretary determines that service under (i) is not available to such individual;

(iii) as a commissioned officer on active duty in the armed forces of the United States or in the National Oceanic and Atmospheric Administration; *or*

(iv) any combination of (i), (ii) or (iii).

46 U.S.C. App. § 1295b(e)(1) (emphasis added).

The Plaintiff argues that this language is conditional, such that cadets only have to apply for and, if tendered, accept a commission in the armed forces reserve. The Defendants contend that this language creates a binding obligation both to serve in the naval reserve or some other armed forces reserve unit and, by implication, to meet physical requirements for such a commission.

Next, the parties focus attention on the power of the Secretary of the Navy to waive any of the statutory service obligations in cases of individual "hardship." The relevant provisions read as follows:

> If the Secretary determines that any individual who has attended the Academy for not less than 2 years has failed to fulfill the part of the agreement . . . such individual may be ordered by the Secretary of the Navy to active duty in the United States Navy to serve for a period of time not to exceed 2 years. *In cases of hardship as determined by the Secretary, the Secretary may waive this paragraph.*

46 U.S.C. App. § 1295b(e)(2) (emphasis added).

The statute continues with a similar provision:

> If the Secretary determines that any individual has failed to fulfill any part of the agreement . . . such individual may be ordered to active duty to serve a period of time not less than 3 years . . . . *In cases of hardship as determined by the Secretary, the Secretary may waive this paragraph.*

Id. § 1295b(e)(3)(A) (emphasis added).

While the Plaintiff argues that this language proves that Congress did not intend the *per se* rule that cadets qualify for the naval reserve at all times, the Defendants assert that this language only affords waiver for hardship incurred by cadets during their third or fourth years at the Academy.

Further, the parties disagree over how to interpret properly the provision of the statute addressing the awarding of Bachelor of Science degrees to cadets:

> The Superintendent of the Academy may confer the degree of bachelor of science upon any individual who has met the conditions prescribed by the Secretary and who, if a citizen of the United States, has passed the examination for a merchant marine officer's license. *No individual may be denied a degree . . . because the individual is not permitted to take such examination solely because of physical disqualification.*

Id. § 1295b(g) (emphasis added). The Plaintiff argues that the Defendants violated the META under this provision by disenrolling him due solely to his medical condition, while the Defendants assert that this provision speaks only to qualifying for merchant marine licenses, not to meeting armed forces reserve requirements.

Finally, the parties discuss the agency regulations promulgated under the META. The Academy is administered by the Maritime Administration ("MARAD"), which is within the Department of Transportation ("DOT"). The general regulatory provisions promulgated under the META with respect to the USMMA read as follows:

> *Midshipmen are appointed to the Academy for training to prepare them to become officers in the U.S. merchant marine*. The Academy, located at Kings Point, New York, is maintained by the Government as a part of the Administration. After successful completion of the 4-year course of study, a graduate of the Academy shall receive a Bachelor of Science degree and a merchant marine license as either a third officer or third assistant engineer . . . issued by the U.S. Coast Guard. *If qualified, an officer may be commissioned as an officer in a reserve component of an armed force of the United States.*

46 C.F.R. § 310.52(a) (emphasis added).

The regulations also reiterate the statutory requirement that USMMA cadets "*[a]pply for an appointment as, accept any tendered appointment as* and serve as a commissioned officer in the USNR (including the Merchant Marine Reserve, USNR), the United States Coast Guard Reserve, *or* any other Reserve component of an armed force of the United States . . . ." 46 C.F.R. § 310.58(a)(4) (emphasis added).

The relevant regulations regarding physical standards for admission and training of midshipmen at the USMMA read as follows:

> *Physical standards*. (1) *A candidate shall meet the physical requirements prescribed by the Department of the Navy for appointment as Midshipman, USNR [United States Naval Reserve] (including the Merchant Marine Reserve, USNR) and the requirements prescribed by the U.S. Coast Guard for*

> *original licensing as a third mate and third assistant engineer*. All candidates shall have color perception and refractive error within the limits prescribed by the Department of the Navy or by the U.S. Coast Guard, whichever are higher.

46 C.F.R. § 310.56(a) (emphasis added).

In addition, the regulations provide for waiver of some medical requirements for enrolled students and applicants to the USMMA:

> (2) The requirement to meet these standards is a continuing one and shall apply through graduation from the Academy. Failure to meet the standards while attending the Academy is grounds for, and may lead to disenrollment. *Individuals who have completed at least two years of study and, as a result of an accident, illness or other cause (during official duty) fail to meet this requirement may be permitted to remain at the Academy at the discretion of, and under conditions set by, the Administrator . . . .*

46 C.F.R. § 310.56(a) (emphasis added).

Later, the regulations state:

> The Administrator *shall have the discretion to grant waivers* of the service obligation contract in cases where there would be undue hardship or impossibility of performance due to accident, illness, or other justifiable reason.

46 C.F.R. § 310.58(f).

The Plaintiff argues that, like the META, the regulations employ conditional language which, along with the allowance for waiver upon hardship, support the conclusion that the agency does not follow a hard and fast rule that all Academy students meet requirements for a naval reserve commission at all times. The Defendants, however, point to another regulatory provision in order to demonstrate that the agency policy is clear:

> Since commissioning in the United States Navy, or any other branch of the Armed Forces, is a requirement for graduation, *no waivers will be granted for medical conditions which would prevent commissioning in at least a restricted status in the U.S. Naval Reserve*.

Id. § 310.56(d) (emphasis added).

As discussed in detail below, the Court finds that the META does not contain a clear statutory requirement that every cadet both serve in, and at all times meet physical qualifications for, commissioning in the armed forces reserve. This conclusion is critical to the Court's analysis under Section 504.[4] The Court further finds that the agency's regulatory interpretation of the META in 46 C.F.R. § 310.56(d) does not support the Defendants' contention that the META obliged them to separate Lane from the USMMA for failure to meet physical requirements for commissioning in the naval reserve.

II. SECTION 504 OF THE REHABILITATION ACT

The Plaintiff claims that, even if the Defendants could show that Congress required all Academy students to meet physical criteria for commissioning in the naval reserve, it would not necessarily follow that such a requirement is "essential" within the meaning of Section 504, which states:

> *No otherwise qualified handicapped individual with a disability in the United States . . . shall, solely by*

[4] The Defendants claim that a suit for violation of the META cannot be maintained because the META does not create a private cause of action. Defendants' Motion, at 17 n.6. Without further briefing the issue, however, the Defendants further state that they "treat the essential elements of plaintiff's cause of action under [the META] as though they stated a claim for violation of the Rehabilitation Act." *Id.* Accordingly, for purposes of this Memorandum Opinion, the Court shall address the Plaintiff's claim without reaching the separate issue of whether a private cause of action exists under the META.

> *reason of his or her disability, be excluded from the participation in*, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under *any program or activity conducted by any Executive agency* . . . .

29 U.S.C. § 794(a) (Supp. 1994) (emphasis added).

The relevant DOT regulation reads as follows:

> *Qualified individual with handicaps means* -- (1) With respect to education services provided by the U.S. Merchant Marine Academy or the U.S. Coast Guard Academy, an individual with handicaps who meets the essential eligibility requirements for participation in and receipt of such services, including the physical standards applicable to the U.S. Naval Reserve or the U.S. Coast Guard.

49 C.F.R. § 28.103.

The Plaintiff argues that, here, Lane is clearly qualified to continue at the Academy. The Defendants argue that, since commissioning in a reserve unit of the armed forces is, under their reading of the META, a statutory requirement for receiving an education at the USMMA, physical qualification for such a commission is necessarily an "essential" condition which must be satisfied. The Court agrees with the Plaintiff that the Defendants have violated Section 504 by disenrolling him solely on the basis of his diabetes mellitus, without attempting to provide reasonable accommodation, and without making an individualized determination under Section 504.

The Court shall now turn to its analysis of the Defendants' actions with respect to Plaintiff Lane under both statutes.

DISCUSSION

I. THE PLAIN LANGUAGE OF THE META DOES NOT REQUIRE ALL CADETS TO BE ELIGIBLE FOR RESERVE SERVICE AT ALL TIMES

The crux of the Defendants' argument under both statutes rests on the agency's reading of the META as expressly mandating that all USMMA students meet the physical requirements for commissioning in the armed forces reserve. The Court finds that the Defendants have unreasonably stretched the plain language of the META too far.

It is undisputed that, on its face, the META sets forth a requirement that USMMA students apply for and, if tendered, accept an appointment as a commissioned officer in the naval reserve, or another reserve unit of the armed forces. 46 U.S.C. § 1295b(e)(1). From this language, the Defendants conclude not only that the META contains an express requirement that all USMMA students serve in the armed forces reserve, but that it further contains a clear requirement that all students at all times meet physical eligibility requirements for commissioning in the reserve. The Defendants concede in their papers that the physical eligibility requirement is, at best, implied from the statute. Defendants' Motion, at 20. Thus there is no clear mandate from Congress that Lane or any other cadet meet physical standards for the naval reserve. Accordingly, the Court finds that the Defendants' further arguments under the META *and* Section 504 lack merit because they are based on the erroneous premise that the META contains a clear and unconditional requirement that all enrolled students meet armed forces reserve requirements.

A. The META only mandates that USMMA students qualify for a license as an officer in the merchant marine and apply for and, if tendered, accept a commission in the armed forces reserve.

The Defendants maintain that the "apply for" and "accept if tendered" language of the META requires that cadets obtain a commission in an armed forces reserve unit as a condition of receiving a taxpayer-funded education at the USMMA. 46 U.S.C App. § 1295b(e)(1). By necessary *implication*, the Defendants argue, the statute also contains a requirement that cadets meet the physical standards to satisfy that obligation.

The Court finds, however, that the language of the META speaks for itself. The plain language of the META requires each cadet to apply for an appointment in the reserve and, if an appointment is offered, to accept it. Indeed, it is undisputed that cadets must apply for such a position. However, the only logical way to give effect to the "if tendered" language is to conclude that, *upon application* for a reserve commission, receipt of such commission becomes conditioned on an evaluation of the cadet's eligibility for a reserve unit at that time. Consequently, in section 1295b(b)(3)(F), Congress required that individuals selected for appointment at the Academy "must *agree to apply for* midshipman status in the United States Naval Reserve . . . before being appointed as a cadet at the Academy." *Id.* (emphasis added). The statute further states that individuals appointed as cadets at the Academy "*may be appointed* . . . as a midshipman in the United States Naval Reserve . . . ." 46 U.S.C. App. § 1295b(c) (emphasis added). Thus, consistently, Congress employed unconditional language only to express the requirements that cadets apply for the reserve, and conditional language to express the possibility that cadets "may be appointed" as midshipmen in the reserve upon graduation. The Court finds no support for the Defendants' suggestion that

Congress did not require what the plain language expresses, namely, that all cadets apply for and accept if tendered a commission in the armed forces reserve but, rather, that Congress required that all cadets serve in, and at all times qualify for, the reserve.

Moreover, in the same subsection containing the "apply for" and "accept if tendered" language, namely, 46 U.S.C. App. § 1295b(e)(1), Congress affords cadets a *choice* in meeting their duty "to serve in the foreign or domestic commerce and the national defense" upon graduation. *Id.* § 1295b(e)(1)(E). Congress expressly provided that, as part of their commitment agreement, students must serve as *either* merchant marine officers, employees in the maritime industry, *or* commissioned officers. *Id.* The Defendants argue that the statutory active duty requirement is entirely separate from the alleged reserve service requirement, and remind the Court that statutes must be read to give meaning to every section.

This, however, is precisely what the Court intends to do. Again, the Court finds that nowhere does the META require, as the Defendants assume, that each and every cadet serve in the armed forces reserve. It only requires that students apply for a reserve commission and accept one if tendered. With respect to the META's *express active* duty requirement, however, the META gives cadets a choice. As long as each cadet serves in one of the three capacities listed in the statute, they have fulfilled their post-graduation commitment under the META. The Court finds that, given the express statutory allowance of a choice upon graduation regarding active duty, it cannot conclude that, on the other hand, Congress *impliedly* intended an unconditional requirement that all cadets serve in a reserve unit of the armed forces. Accordingly, the Court also finds that there is no merit to the Defendants' contention that the statute impliedly requires that all cadets be qualified for armed forces reserve positions throughout their training.

Furthermore, the Court observes that other subsections of the META *are un*conditional; thus Congress knew how to make an express, mandatory requirement when it wanted to. For example, in the same section which sets forth the "apply for" and "accept if tendered" language, the statute unconditionally requires cadets to complete the Academy's course of instruction, to fulfill the requirements for a license as an officer in the merchant marine of the United States,[5] to maintain a license as an officer in the merchant marine of the United States for at least 6 years following graduation, and to serve as either a merchant marine officer, an employee in the maritime industry or as a commissioned officer in the armed forces upon graduation. 46 U.S.C. App. § 1295b(e)(1)(A)-(E)

The Court observes that, if Congress so clearly intended to make service in and qualification for, the reserve an unconditional requirement, it would have used the unconditional language it employed throughout the rest of section 1295b(e)(1) in order to say just that. Moreover, because the statute contains a provision regarding fulfillment of the requirements for a merchant

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[5] The Defendants argue that the Plaintiff necessarily implies physical requirements into the subparagraph of the META which sets forth this prerequisite to appointment to the USMMA and that, therefore, the same implication must be afforded the "apply for" and "accept if tendered" language of the subparagraph addressing reserve commissions. *See* 46 U.S.C. App. § 1295b(e)(1)(B)(D). The Court observes, however, that subparagraph B states that students must "fulfill the requirements" for obtaining a merchant marine license. *Id.* § 1295b(e)(1)(B). It is not such an intuitive leap to imply "physical or otherwise" into language which expressly deals with requirements for obtaining a merchant marine license. In contrast, subparagraph D says nothing about requirements or prerequisites for obtaining a commission in the armed forces reserve. Thus, the Court cannot agree with the Defendants that, in light of the Plaintiff's reading of physical requirements into subparagraph B, it is a necessary implication of subparagraph D that a student must satisfy the physical requirements for commissioning in the armed forces reserve.

marine license, the absence of such a provision regarding the requirements for a reserve commission suggests that Congress did not intend that satisfaction of standards for service in the reserve be an absolute graduation requirement. *See I.N.S. v. Cardoza-Fonesca*, 480 U.S. 421, 432, 107 S. Ct. 1207, 1213, 94 L.Ed.2d 434 (1987) ("[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion") (quoting *Russello v. United States*, 464 U.S. 16, 23, 104 S. Ct. 296, 300, 78 L.Ed.2d 17 (1983)).

The Defendants explain the tentative nature of the language in the META as reflecting the President's appointment power -- because the President, acting through the Secretary of the Navy, is empowered under the Constitution to determine who will be offered a reserve commission, Congress cannot mandate appointment. However, Congress has used much stronger language than that of the META to mandate that graduates of Annapolis and West Point accept positions in reserve if an active duty commission is not tendered. *See* 10 U.S.C. § 6959(a)(3) (App. 1994) (graduates "*will accept* an appointment as a commissioned officer in the Naval Reserve") (emphasis added); 10 U.S.C. § 4348(a)(3) (App. 1994) (graduates "*will accept* an appointment as a commissioned officer as a reserve for service in the Army Reserve or Air Force Reserve") (emphasis added). Moreover, even accepting arguendo Defendants' argument that the tentative nature of the META's language reflects the reservation of the appointment power to the President, Congress still could have required every student to meet the requisite qualifications for a naval reserve commission in the event that the President does appoint certain students to the reserve. Instead, Congress required only that cadets fulfill the requirements for obtaining a merchant marine license.

The Defendants themselves point to the military academy statutes cited above, which contain the "accept" and "if tendered" language in describing the active duty requirements, to support their argument that all cadets must serve in the armed forces reserve and therefore must meet physical prerequisites for the reserve while at the USMMA. *See* 10 U.S.C. § 6959(a) (Annapolis); 10 U.S.C. §§ 4348(a) (3) (West Point). The Defendants assert that the language of the META mirrors the language employed by Congress in these statutes "which has been recognized as creating the service obligations of graduates" of Annapolis and West Point. Defendants' Opposition, at 10-11. The Defendants further warn that, if the Court invalidates the reserve service requirement at the USMMA, it must also invalidate the same requirement at the Naval, Military, Air Force and Coast Guard Academies because each uses the same statutory language to create the same obligations.

The Court finds these arguments without merit. First, it is undisputed that the Annapolis Academy and West Point serve only a military purpose. In contrast, Congress charged the USMMA with a dual purpose and, accordingly, gave cadets a choice of where to serve their active duty after graduation. 46 U.S.C. App. § 1295b(e)(1)(E). Thus there is no support for the sweeping conclusion that the Court's holding with respect the USMMA will have grave implications for service academies whose sole purpose is to provide the military with trained officers. Indeed, the unique nature of the "dual purpose" of the USMMA is what, at bottom, generated this dispute.

In addition, the language of 10 U.S.C. § 6959(a) and § 4348(a), when read in context, does *not* mirror that of the META. Rather, both Title 10 statutes contain unconditional language requiring that cadets "*will accept* an appointment as a commissioned officer" in the reserve *if* an appointment in the *regular* Army, Air Force or Marines is not tendered. 10 U.S.C. §§ 6959(a), 4346(a)

(App. 1994) (emphasis added). Thus in these statutes, Congress used unconditional language to create the reserve requirement, and conditional language to create the active duty requirement. Similarly, the META contains an unconditional requirement to obtain and maintain merchant marine license, and a conditional requirement to serve in the armed forces reserve. 46 U.S.C. App. § 1295b(e)(1)(B)-(D). Moreover, unlike in the META, in neither military academy statute did Congress include the lesser preliminary requirement that cadets *apply for* a commission in either the regular armed forces or the reserve. Clearly, Congress envisioned something different, to at least some degree, for students appointed to the USMMA than it did for students at Annapolis or West Point.[6] The Court finds that it must give effect to congressional intent as expressed by the plain language of the META.[7]

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[6] Moreover, the Court observes that the case cited by the Defendants for the proposition that a graduate of West Point incurs a duty service obligation is not controlling of the Court's reading of the "apply for" and "accept if tendered" language under the META. In *Shaffer v. Cheney*, 725 F. Supp. 40 (D.D.C. 1989), the district court cited 10 U.S.C. § 4348(a)(2)(B) for the proposition that "[a] graduate of [West Point] *generally* incurs a five-year [active duty service obligation]." *Shaffer*, 725 F. Supp. at 46 (emphasis added). The court made no express holding with respect to the "if tendered" and "accept" language of the statute which nevertheless, as described above, differs from that of the META. Accordingly, the Court finds that *Shaffer* in no way supports the Defendants' claim that the language of the META, a wholly different statute from those discussed in *Shaffer*, firmly establishes a service obligation. *Shaffer*, 725 F. Supp. at 46.

[7] The Defendants submit a detailed description of the META's legislative history and conclude that Congress's "clear expectation" was that USMMA graduates would serve in both active and reserve duty upon graduation. Defendants' Motion, at 25-31, 30. The Court observes, however, that the legislative history, as cited by the Defendants, does not unambiguously support this conclusion. Rather, portions of the testimony quoted by the Defendants also support a conclusion that Congress envisioned that eligibility for a reserve commission would be

B. The META's language affording waivers for hardship and precluding the denial of degrees based solely on an inability to meet the physical requirements for obtaining a merchant marine license undermines the Defendants' central argument.

In support of the argument that Congress created a mandatory requirement that all cadets meet the physical qualifications for a commission in the armed forces reserve, the Defendants claim that the statutory language affording waiver in cases of hardship creates a quid pro quo between a cadet and the Government -- if the cadet fails to fulfill his or her agreement, the Secretary of the Navy can order him or her to active duty in the armed services as a "pay back" for receiving a taxpayer-funded education at the USMMA. *See* 46 U.S.C. App. § 1295b(e)(2)-(3)(A). The Defendants further contend that this deal assumes that each cadet would be qualified to serve in a reserve unit of the armed forces.

The Plaintiff argues, however, that the language waiving this duty for "hardship" confirms that Congress did not intend that it be mandatory for all cadets to meet physical qualifications for a naval reserve commission at all times. The Court agrees with the Plaintiff that the language affording waiver for hardship undermines the argument that USMMA students at all times must meet physical requirements for a commission in the naval reserve. Indeed, the Defendants cannot, and do not, deny that a waiver exists, but argue that the agency's interpretation of the statute as strictly limiting the waiver

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determined upon application for such a commission. *See id.* at 28. Moreover, nothing cited by the Defendants speaks to their reading of the META as impliedly mandating that all students such as Lane meet physical requirements for a reserve commission or suffer disenrollment. Accordingly, the Court declines to afford considerable weight to the legislative history cited by either the Defendants or the Plaintiff.

to students in their third or fourth years at the Academy, is a reasonable one.

The Court notes at the outset that, in arguing that the hardship waiver only applies to third or fourth year students, the Defendants concede that the reserve requirements, if any, do not apply at all to students in their first and second years. In particular, the Defendants state that "a midshipmen's obligations under the statute do not even become effective until a student has completed 2 years of study . . . . Thus, prior to their junior year, there is nothing for the Secretary to waive." Defendants' Opposition, at 18-19. The Defendants argue that the Academy can disenroll first and second year students who fail to meet the requirements for a reserve commission because "the government can see immediately that it will not get the benefit of its bargain with that midshipman." *Id.* at 19.

However, the Court observes that, if the Defendants concede that the reserve obligations do not apply to students such as Lane, their argument that Lane was separated from the Academy because of his failure to meet statutory reserve requirements loses any merit. The Court is puzzled and unpersuaded by the Defendants' inconsistent statements. The Defendants want to argue on one hand that, because the statute contains a clear requirement that cadets meet prerequisites for a reserve commission, Lane's disenrollment was warranted. Yet on the other had, the Defendants want to argue that the agency's refusal to extend the statute's waiver provisions to first and second year students is warranted because the clear requirement regarding reserve duty does not apply to such students. The Defendants cannot have it both ways. Moreover, the Court finds that the Defendants' alternative argument that Lane's disenrollment was permissible because "the government is justified in terminating the arrangement before any obligation is incurred" in order to get its

"benefit of the bargain" is wholly unsupported by the statute or the regulations. *Id.* at 19.

Moreover, notwithstanding the hardship provisions, the Court finds the language of 46 U.S.C. App. § 1295b(g) difficult to square with the Defendants' main contention. That provision expressly states that "[n]o individual may be denied a degree . . . because the individual is not permitted to take [the merchant marine officer's license] examination solely because of physical disqualification." 46 U.S.C. App. § 1295b(g). The Defendants argue that this language allows cadets to graduate despite physical disabilities disqualifying them from receiving a merchant marine officer's license. Read in conjunction with § 1295b(e)(1)(B), which requires that cadets obtain their license as a precondition to receiving a USMMA degree, the Defendants assert that section 1295b(g) alleviates the "harsh result" which would follow from statutorily precluding cadets from receiving a degree where they develop a physical disability which disqualifies them from obtaining a merchant marine license. Defendants' Opposition, at 13-14. The Defendants contend that this provision operates to remove the statutory pre-condition to graduation where cadets develop a physical problem late in their studies, but in no way relieves graduates of their separate active duty and reserve service obligations, as the Plaintiff maintains.

The Court finds the Defendants' argument unconvincing. The Court agrees that this provision in no way directly speaks to the alleged requirement that all cadets meet physical qualifications for commissioning in the armed forces reserve. However, the fact that Congress afforded an express waiver of an express condition for admission to the USMMA is quite telling. It is undisputed that Congress intended all cadets to fulfill the requirements for, and to maintain a license as, an officer in the merchant marines. 46 U.S.C. App. § 1295b(e)(1)(B)-(C). From these clear mandates, a requirement that cadets meet the requisite physical quali-

fications for such a license can be easily implied. If not, these express requirements would be meaningless. The Defendants apply the same reasoning to imply a requirement that cadets meet armed forces reserve qualifications from section 1295b(e)(1)(D), which contains the "apply for" and "accept if tendered" language. That language, however, does not set forth the same clear mandate contained in the provisions listed directly before it.

Moreover, it is undisputed that the requirements for a merchant marine license are not as rigorous as those for a reserve commission. *See* Stipulated Facts at ¶ 36. Indeed, the Defendants conceded at the hearing that Lane could obtain such a license if his diabetes were kept under control. In addition, the Court notes that at least 50 people with the same condition are currently operating under a merchant marine license at sea. *Id.* at ¶ 39.

It then follows that, because the physical qualifications for a merchant marine officer's license are *less stringent* than those required for a naval reserve commission, and because the statute explicitly states that a cadet cannot be denied a diploma because he or she could not meet the qualifications for a merchant mariner officer's license, it would be illogical to conclude that the same person with the same disability would be subject to disenrollment for failure to meet the more stringent -- but implied -- naval reserve prerequisites. The Defendants argue that section 1295b(g) is irrelevant because it applies only to merchant marine license requirements, not to qualifications for commissioning in the reserve. This argument, however, does nothing to explain why Congress would *intend* such inconsistent results with respect to physical disqualification for express, versus implied, sets of requirements.

The Defendants claim that, while section 1295b(g) applies to merchant marine license requirements, the statutory provisions for waiver upon hardship apply to the alleged naval reserve requirement. Under section

1295b(e)(3)(A), a cadet who fails to meet his or her maritime or military reserve service obligations must perform active duty military service for a period of three to five years, depending on the unexpired portion of their obligation. If the Secretary of Defense is unable or unwilling to order the defaulting graduate to active duty service, the Secretary of Transportation may recover the cost of educating that individual. *Id.* § 1295b(e)(3)(B). The Defendants further observe that Congress authorized the Secretary of Transportation to waive the provision allowing defaulting graduates to be called to active duty service in cases of hardship. *Id.* § 1295b(e)(3)(A). The Defendants thus conclude that this provision, not section 1295b(g), provides authority for the agency to excuse a defaulting graduate's reserve service obligations.

However, these latter provisions deal with punishment for failing to comply with the express requirements for appointment to the Academy. If a cadet fails to meet these requirements, such punishment is automatically imposed under the statute. At that point, the Secretary may waive the punishment upon a finding of hardship. This is a very different scheme from that of section 1295b(g) which completely waives an express requirement to graduation, with no repercussions. Again, how Congress would on one hand expressly avoid the "harsh result" of precluding cadets from graduating from the United States Merchant Marine Academy for their failure to meet physical requirements for a merchant marine license, yet on the other impliedly mandate that these same cadets meet more stringent standards for a reserve commission or lose their appointment at the Academy, is a mystery which the Defendants have not explained. To use the Defendants' characterization of the purpose behind section 1295b(g), the latter result, which the Defendants condone, is a *particularly* "harsh" one which Congress surely would not have intended if, as the Defendants concede, it intended to prevent the harsh result of precluding cadets from graduating for failure to

meet physical prerequisites to obtaining a merchant marine license.

Moreover, this result contradicts the Defendants' argument that Congress intended the USMMA to serve two priorities equally, namely, to serve the merchant marine and to serve the armed forces reserve. Rather, under the Defendants' construction of the statute, Congress must have intended that more leniency be employed with respect to merchant marine license requirements than with respect to armed forces reserve requirements. Surely, this could not have been Congress's intention for the United States Merchant Marine Academy. The Court thus concludes that the META does not contain a requirement that all cadets, absent a waiver for hardship late in their education, must at all times meet physical prerequisites for commissioning in the armed forces reserves if they are to remain at the Academy.

Finally, the Defendants argue that the Plaintiff's interpretation of section 1295b(g) effectively nullifies any physical requirements for graduation because it presumes that Congress simultaneously established service in the merchant marine as a condition of attending the USMMA *and* precluded the Academy from enforcing that requirement through physical prerequisites to admission. However, the Defendants ignore the distinction between admission and graduation after enrollment. This provision clearly applies to *enrolled* cadets, and the Plaintiff's argument speaks to enrolled cadets. Nowhere do the Defendants point to any authority indicating that section 1295b(g) also applies to individuals *seeking* enrollment. Both section 1295b(g) and the waiver provisions envision situations where cadets begin their education at the USMMA and, for some reason, face an obstacle to meeting every provision in the META, whether the obstacle is self-imposed or not. Accordingly, the Court sees no reason why it cannot adopt the Plaintiff's view and remain in consonance with the express requirements the META sets forth for appointment to the Academy.

C. MARAD's own regulations, and its inconsistent interpretation thereof, belie the Defendants' argument that the USMMA has an unconditional rule that all cadets meet all physical requirements for commissioning in the armed forces reserve, absent waiver late in their education.

As discussed above, the Court finds that the agency's decision to separate Lane from the Academy upon discovery of his diabetes mellitus conflicts with the plain language of the statute. Moreover, the Court observes that the agency's own past practices and regulations undermine the Defendants' claim that MARAD was bound to disenroll Lane when it learned of his diabetes.

First, the Court observes that in cases involving disabilities other than diabetes, disabled students have been allowed to remain at the Academy and receive their academic degree. Stipulated Facts at ¶ 37. The Defendants do not contest that the Academy allowed students to remain at school and graduate despite the Academy's learning, during the term of their enrollment, that the students were color blind. *Id.* Notably, unlike diabetes mellitus, color blindness is a disability which, as the Court is advised, disqualifies an individual from obtaining not only a naval reserve commission, but a merchant marine license as well. Plaintiff's Motion for Preliminary Injunction, Exhibit 15 at ¶ 6 (Declaration of Commander Joseph Gebhard). *See also* 46 C.F.R. § 10.205(d). In addition, in recent years, students have attended and graduated from the Academy despite the loss of a limb, loss of an eye, and brain damage, while they were students. Stipulated Facts at ¶ 37.

Moreover, the Academy's actions with respect to Lane were inconsistent with its alleged *per se* policy. The Stipulated Facts reveal that, in addition to allowing other

disabled students to graduate despite this rule, Dr. Kalash, the Academy's Chief Medical Officer, assessed Lane back in February of 1992 as having "Early Diabetes Type I," yet took no action. In addition, Dr. Kalash noted that "Capt. Bauer notified & communicated problem to BuMed," the Head of the Department of Naval Science at the Academy, and instructed Lane to monitor his blood sugar levels and report any abnormalities. Stipulated Facts at ¶¶ 13-14. Moreover, upon receipt of a letter from Lane's father requesting review of the agency's decision, Captain LeBack, then-Administrator of MARAD, did not invoke the unconditional rule that enrolled cadets who discover conditions which disqualify them for naval reserve service must be disenrolled, but put Lane on "administratively approved absence status" and afforded him "the opportunity to establish as fact the arguments raised on [his] behalf." Plaintiff's Motion for Preliminary Injunction, Exhibit 11 at 3 (letter from LeBack to Lane dated January 15, 1993). Thus, rather than acting immediately to disenroll Lane in accordance with its alleged "long standing" policy,[8] the Academy permitted Lane to remain at the school for close to a year before finally separating him from the Academy, and for seven months before initiating proceedings to do so. *See* Stipulated Facts at ¶¶ 11-19, 21-22, 27.

Moreover, the agency's own regulations contradict the Defendants' claim that this "long standing" policy is clear and has been consistently implemented. The Plaintiff argues that the government claims discretionary authority under its own regulations to permit candidates to remain at the Academy despite failure to meet naval reserve requirements. Thus, he claims, there is no *per se* exclusion of all students not meeting these requirements. The Defendants claim that, because of his diabetes, the Plaintiff cannot meet the physical requirements set forth in the regulations, which mandate Lane's disenrollment

[8] Defendants' Opposition, at 16.

but fulfill congressional intent by allowing for waiver upon hardship incurred by cadets late in their education.

The Court first observes that the regulations do, in part, require candidates for admission to "meet the physical requirements . . . for appointment as Midshipman, [United States Naval Reserve,]" as well as those for obtaining a merchant marine license. 46 C.F.R. § 310.56(a). Moreover, the regulations state that failure to meet these standards "while attending the Academy is grounds for, and may lead to disenrollment." *Id.* § 310.56(a).

However, the Court finds the regulations internally inconsistent. For example, the regulations state that "[i]ndividuals who have completed at least two years of study and, as a result of an accident, illness or other cause (during official duty), fail to meet this requirement may be permitted to remain at the Academy at the discretion of, and under conditions set by, the Administrator . . . ." *Id.* Later, however, the regulations allow for waiver for hardship without imposing *any* limitation on first and second year students. *Id.* § 310.58(f).

Moreover, the Court finds that these regulations, read together with others, simply do not support the Defendants' claim that a *per se* rule exists which required Lane's disenrollment after his first year. First, the regulations properly employ the conditional language of the statute, and definitively state that cadets "are appointed at the Academy for training to prepare them to become officers in the U.S. merchant marine" and that after graduation they shall receive a merchant marine license. *Id.* § 310.52(a). Later, the regulations state that "*[i]f qualified*, an officer *may be* commissioned as an officer in a reserve component of an armed force of the United States." *Id.* (emphasis added).

Thus the mission of the USMMA, here reflected as its primary one, to train students to become merchant marine officers is made clear, the need for students to

qualify for merchant marine licenses is made clear, and the fact that cadets may -- not must -- be commissioned in the armed forces reserve, if qualified, is made clear. Notably, the regulations recognize that only "qualified" students may be commissioned as officers in the armed forces reserve, and thus assume that all enrolled students will not qualify. 46 C.F.R. § 310.52. The Court observes that such a reading is consistent with the language of the META and does not justify the Defendants' peremptory expulsion of Lane for failure to qualify while a student at the USMMA.

Second, the regulations require that cadets "[a]pply for an appointment as, [and] accept any tendered appointment as" a commissioned officer in the United States Naval Reserve, the United States Coast Guard Reserve *or* any other Reserve component of the armed forces. *Id.* § 310.58(a) (4) (emphasis added). Thus, under the agency's express regulations, Lane can fulfill his statutory obligations by serving in the Coast Guard Reserve. The Defendants have conceded that Coast Guard service is possible if Lane keeps his condition under control, and they have conceded that Dr. Tanen, an endocrinologist treating Lane, has concluded that Lane's diabetes is under "extremely good control." Stipulated Facts at ¶ 30.

Third, the Defendants point out that the regulations also state that "no waivers will be granted for medical conditions which would prevent commissioning in at least a restricted status in the U.S. Navy Reserve." *Id.* § 310.56(d). However, this language directly conflicts with the Defendants' own interpretation of the META itself. The Defendants do not contest that the META allows for waiver upon a finding of hardship, and argue that these provisions apply directly to the requirement that all cadets meet armed forces reserve qualifications.[9]

[9] In particular, the Defendants state that "Congress recognized that hardship situations may develop in which a graduate may default on his or her maritime or military reserve obligations. Thus, Congress provided that '[i]n cases of hardship as determined by the Secretary [of Transportation], the Secretary may waive [the provision allowing defaulting graduates to be called to active duty service.]'" 46 U.S.C. App. § 1295b(e)(3)(A). "This provision . . . provides authority for the agency to excuse a defaulting graduate's service obligations." Defendants' Opposition, at 15.

In this regulatory provision, however, the agency precludes the very waiver which the Defendants argue, and the Court agrees, Congress clearly set forth in 46 U.S.C. App. §§ 1295b(e)(2)-(3)(A).[10] Accordingly, the Court declines to bind itself to 46 C.F.R. § 310.56(d), as it is unsupported by the META, while other regulatory provisions, which the Court shall follow, are consistent with the plain language of the META.

D. Because the Court finds that the Defendants' alleged policy mandating the separation of Lane from the Academy upon discovery of his diabetes is not supported by the statute or its regulations, the Court shall not defer to the Defendants' espoused reading of the META.

In *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S. Ct. 2778, 81 L.Ed.2d 694 (1984), the Supreme Court set forth the method by which federal courts shall review an agency's construction of a statute it administers:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the

[10] Technically, 46 U.S.C. App. § 1295b(e)(2)-(3)(A) applies to waive the punishment imposed by the META upon default, while 46 C.F.R. § 310.56(d) precludes the Superintendent of the USMMA from waiving physical prerequisites to obtaining a commission in the U.S. Naval Reserve upon application by an enrolled student. However, for purposes of the Court's analysis, the difference is not significant because the statutory language clearly affords waiver of the same physical requirements of which the regulation precludes waiver. The Court finds that Congress could not have intended this result.

> end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, . . . the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 842-43 (footnotes omitted). The Supreme Court also noted that "[t]he judiciary is the final authority on issues of statutory construction which are contrary to clear congressional intent." *Id. at* 843 n.9.

The Defendants contend that the Court must defer to the agency's interpretation of the statute as requiring that all cadets meet the physical qualifications for commissioning in the armed forces reserve. The Plaintiff responds that the plain language of the statute, its purpose, and its history all demonstrate that Congress did not intend the rule the Defendants urge. Moreover, the Plaintiff argues that, under *Chevron*, this Court can determine Congress's intention by using traditional tools of statutory construction and, therefore, no agency deference is appropriate. Further, Lane asserts that little deference is due where, as here, the agency has been inconsistent in its interpretation of the statute. The regulation allowing waiver for hardship, as well as the USMMA's admission of students with other disabilities which disqualify individuals from commissioning in the naval reserve, belie the Defendants' claim that this is a long standing agency policy. In addition, the Plaintiff argues, the Defendants behaved inconsistently with respect to Lane's diabetes mellitus.

The Court finds that the matter may be determined under the first prong of the *Chevron* analysis because congressional intent is clear. Where congressional intent can be determined "by using 'traditional tools of statutory construction,' then that interpretation must be given effect." *Natural Resources Defense Council v. Reilly*, 983 F.2d 259, 266 (D.C. Cir. 1993) (quoting *NLRB v.*

United Food & Commercial Workers Union, 484 U.S. 112, 123, 108 S. Ct. 413, 420, 98 L.Ed.2d 429 (1987)). In the META, Congress expressly stated that cadets apply for and accept, if tendered, an appointment as a commissioned officer in the United States Naval Reserve, or another reserve unit of the armed forces. 46 U.S.C. App. § 1295b(e)(1)(D). The Court thus finds that Congress did not require that all cadets meet all physical requirements for such an appointment or lose their status as an enrolled student at the USMMA. Rather, Congress only expressly required that cadets "fulfill the requirements for a license as an officer in the merchant marine of the United States . . . ." *Id.* § 1295b(e)(1)(B).

Moreover, should the Court reach the second prong of *Chevron*, it need not adopt the Defendants' reading of the META because "the case for judicial deference is less compelling with respect to agency positions that are inconsistent with previously held views." *Pauley v. Bethenergy Mines, Inc.*, 111 S. Ct. 2524, 2535, 115 L.Ed.2d 604 (1991). *See also I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30, 107 S. Ct. 1207, 94 L.Ed.2d 434 (1987) ("An agency interpretation of a relevant provision which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view.") (quoting *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673, 68 L.Ed.2d 80 (1981)). Here, the relevant regulations repeat the "apply for" and "accept if tendered" language of the META itself, yet the Defendants now contend that its long standing policy has been that all students must meet the requisite physical requirements for a naval reserve commission. However, as discussed above, the Defendants concede that the USMMA has allowed students to graduate despite physical conditions which would disqualify them for a commission in the armed forces reserve.

Moreover, the agency displayed great inconsistency with respect to Lane's particular case. Although the

Defendants stated in September of 1992 and April of 1994 that they were required to disqualify Lane from further studies at the Academy, at other times the Academy took a quite different position. In February of 1992, for example, although the Chief Medical Officer learned of Lane's condition and reported it to the Head of Naval Science at the Academy, Lane was allowed to remain at the Academy without any sanctions. Furthermore, in January 1993, the acting head of MARAD, Captain LeBack, officially placed Lane on "administratively approved absence" status rather than declaring him ineligible to continue at the Academy as a result of his diabetes mellitus, as the alleged *per se* rule would require. Captain LeBack's letter also conflicts with MARAD's earlier position in September of 1992 when it informed Lane that "diabetes is a disqualifying condition . . . You are not eligible for appointment as midshipman, MMR/USNR nor for commissioning as a Naval Reserve Officer." Plaintiff's Motion for Preliminary Injunction, Exhibit 8 (memorandum from Krinsky to Lane dated September 21, 1992).

The Defendants respond that the USMMA did not know with certainty that Lane had diabetes mellitus until his father wrote to the Superintendent on July 23, 1992, advising him of that fact. Moreover, they explain that MARAD's Administrator, Captain LeBack, acted "[i]n reliance on statements of [Lane's] representatives that [Lane] . . . could secure a reserve officer's commission." Defendants' Motion, at 8. In any event, they argue, the Academy physician's failure to implement USMMA policy cannot estop the agency from executing that policy when it learned with certainty that the Plaintiff had diabetes mellitus.

The Court is not persuaded by the Defendants' arguments on this issue. Not only did the Chief Medical Officer and Head of Naval Science refrain from enforcing the agency's alleged policy, but the acting head of MARAD himself entertained the possibility that

Lane could remain at the Academy despite his affirmative diagnosis as having diabetes mellitus. If Lane's condition did so clearly warrant his disenrollment under the agency's policy, there would be absolutely no reason why the Head of MARAD would do anything but reiterate that rule and separate Lane from the Academy immediately and unconditionally. Moreover, Captain LeBack's alleged reliance on statements of Lane's representatives that Lane could secure a reserve commission undermines the Defendants' contention that reserve commissioning requirements were mandatory for all cadets and that diabetes was *per se* inconsistent with such standards, as MARAD expressly asserted in its letter of April 15, 1994. The Court finds that the Stipulated Facts show that the Academy did not consistently follow its allegedly clear and long standing policy, a conclusion which, in turn, sheds doubt on the clarity and longevity of the policy itself.

Accordingly, the Court finds that traditional tools of statutory construction reveal that congressional intent is clear: the META does not require that all cadets meet physical requirements for commissioning in the naval reserve or lose their enrollment status. As detailed above, the interpretation espoused by the Defendants in the instant matter runs contrary to the express language of the statute, which requires only that cadets apply for and, if tendered, accept a commission in the armed forces reserve. Moreover, the Defendants' position is inconsistent with its own regulations and past policy. Accordingly, the Court finds that the agency's action with respect to Lane is due no deference.

II. THE COURT FINDS THAT THE DEFENDANTS VIOLATED SECTION 504 BY DISENROLLING LANE SOLELY ON THE BASIS OF HIS DIABETES MELLITUS

A. The Defendants have not shown that meeting the physical qualifications for commissioning

in the armed forces reserve is an essential program requirement of the USMMA.

It is undisputed that Section 504 is violated if (1) the claimant has a disability; (2) he or she was denied participation in a federal program because of that disability; and (3) he or she was otherwise "qualified" for the program. *See Gallagher v. Catto*, 778 F. Supp. 570, 577 (D.D.C. 1991), *aff'd*, 988 F.2d 1280 (D.C. Cir. 1993). The issue in the instant case is whether the Plaintiff was otherwise qualified to remain at the USMMA.

A qualified disabled person is one who meets all academic and non-academic qualifications that are "essential to participation in the program in question." *Southeastern Community College v. Davis*, 442 U.S. 397, 406, 94 S. Ct. 2361, 60 L.Ed.2d 980 (1979) (citation omitted). Further, even if the person *cannot* meet all essential qualifications, he is still "qualified" under Section 504 if reasonable modifications in the program will accommodate his disability. *School Board of Nassau County v. Arline*, 480 U.S. 273, 287 n. 17, 107 S. Ct. 1123, 94 L.Ed.2d 307 (1987); *Davis*, 442 U.S. at 408. Such accommodations are reasonable if they do not require a "fundamental alteration in the nature of [the] program" in question or if they pose "undue financial and administrative burdens." *Arline*, 480 U.S. at 287 n.17; *Davis*, 442 U.S. at 410, 412. The federal agency bears the burden of establishing that "further reasonable accommodation would present an undue hardship." *Catto*, 778 F. Supp. at 577-78. In addition, the Supreme Court has stressed that "in most cases" the question of whether a disabled person is qualified will involve an "individualized inquiry" and "appropriate findings of fact." *Arline*, 480 U.S. at 287. Thus a refusal to apply Section 504 to a class of disabled persons is lawful only where Congress has "specifically determined that no individualized inquiry [i]s necessary." *Traynor v. Turnage*, 485 U.S. 535, 551 n.11, 108 S. Ct. 1372, 99 L.Ed.2d 618 (1988).

Once again, the Defendants base their entire argument under Section 504 on the erroneous premise that Congress intended that all cadets meet the physical qualifications for commissioning in the armed forces reserve in order to remain at the Academy. The Defendants argue that, since commissioning in an armed forces reserve unit is, in their view, a statutory requirement for receiving an education at the USMMA, physical qualification for such a commission is necessarily an "essential" condition which must be satisfied. Because Lane cannot meet this essential program requirement, they reason, he is not otherwise qualified to complete his education at the USMMA. The Defendants further claim that exempting Lane from this general requirement would undermine the Academy's mission to provide trained reserve officers for military service. Because of the congressional mandate that cadets serve in, and qualify for, a reserve commission, the Defendants assert, such an accommodation would work a "fundamental alteration in the nature of the program." The Defendants therefore conclude that their actions with respect to Lane do not violate the Rehabilitation Act.

The Court cannot endorse the Defendants' position that continuous eligibility for the armed forces reserve is an essential program requirement under Section 504, or that attempting to accommodate Lane would result in undue hardship. As discussed above, the META in no way binds the Academy to the *per se* policy it purports to follow; rather, the statute merely requires cadets to apply for and, if tendered, accept a naval reserve commission, or a commission in another reserve unit of the armed forces. Moreover, the Defendants admit that such requirements, if any, do not even apply to students such as Lane who have not yet reached their third year. Consequently, the Defendants cannot simply point to that statute and definitively conclude that maintaining eligibility for such a commission is an essential requirement to remaining at the USMMA and that, therefore, their actions were consistent with Section 504.

In addition, the Court finds that, *aside from* pointing to the statute, the Defendants have not offered any explanation of how continuous eligibility for an armed forces reserve commission is an essential program requirement for purposes of Section 504. Rather, given that many people with diabetes have obtained merchant marine licenses, and at least 50 people with diabetes mellitus are currently operating under a merchant marine license at sea, the Court finds that the rigid naval reserve requirements are not "essential" to at least one purpose of the program, namely, training officers for the merchant marine.

Further, even if producing people for military reserve service were an equally important purpose under the META, the Court finds that purpose is fully satisfied without Lane through the Academy's graduation of the many other cadets who do not have diabetes. Indeed, it is undisputed that a large portion of these graduates never enter the reserve. As counsel for the Plaintiff have observed, if the situation at hand arose in a time of war, or if the Defendants could demonstrate a recognition by Congress that the supply of reserve troops was sorely insufficient when Lane was disenrolled, the Defendants' argument under Section 504 might have some merit. But here, the Defendants concede that they can "only speculate" as to the impact of allowing Lane to graduate. Defendants' Opposition, at 28. The Defendants have made no showing that the reason for separating Lane from the Academy was essential to the program at all.

B. The Defendants have not even attempted to make reasonable modifications in the program to accommodate Lane's disability.

Moreover, even if cadets' continuous eligibility for an armed forces reserve commission were an essential program requirement, the agency carries the burden of showing that it could not reasonably accommodate Lane's disability. *Gallagher v. Catto*, 778 F. Supp. at 577-78. The Defendants argue that any accommodation

would require a fundamental alteration in the nature of its program because the physical eligibility requirement for an armed forces reserve commission is mandated by the META.

It is undisputed that, aside from his diabetes, Lane is extremely well qualified to complete his education at the USMMA. Moreover, in Lane's case, he developed the disease after enrolling in the Academy, and he has maintained an excellent record with respect to both academic *and* physical testing. This is not a case of an applicant challenging the Academy under Section 504. Rather, Lane was an enrolled student, who was fully qualified upon application, and who made a serious investment in the USMMA and in his future following his education there. In turn, the government, through tax-payer dollars, also made an investment in his training and, as Lane's record shows, their investment was a good one. It is undisputed that, if Lane continues to control his diabetic condition, he will make a fine merchant marine officer.

Accordingly, the Court finds that the Defendants have made no showing under Section 504 that the Academy cannot provide reasonable accommodation for Lane's condition. Such accommodation, as far as the Court can tell from the record before it, would amount to simply allowing Lane to graduate. Those most familiar with Lane's abilities and control over his diabetes confirm that he could complete his education and training at the Academy with little or no difficulty. Plaintiff's Motion for Preliminary Injunction, Exhibit 10 at 1 (medical evaluation letter by Dr. Mark Tanen); Exhibit 15 at ¶¶ 5, 7 (Declaration of Commander Joseph Gebhard). Moreover, the Defendants admit that, in their view, such accommodation may be made for third and fourth year students under the regulations addressing the statute's waiver provisions, and they admit that the Academy has allowed students in the past with a lost limb, a lost eye, brain damage, and color blindness to remain at the

Academy and graduate despite their disabilities. The Court cannot conceive of any reason why accommodating Lane would, in contrast, cause the Academy grievous injury. Moreover, Lane developed the disease after he enrolled. Thus a finding that the Academy's act of separating Lane from the USMMA after he discovered he had diabetes mellitus would not necessarily impact the Academy's admission standards.

Moreover, to the Court's knowledge, Lane has not asked to be excused from participating in any of the USMMA's academic or physical programs as a result of his condition. Thus nothing further than allowing Lane to complete his courses of instruction along with every other student would be required to accommodate him under Section 504. The Defendants have not demonstrated where the alleged undue hardship would lie in this event. It is true that the Court's holding, depending on the facts of the case, might preclude the Academy from disenrolling future students who, after they enroll, develop a physical condition inconsistent with requirements for a naval reserve commission, yet meet all other program requirements. But the Defendants have not persuasively shown that accommodating such students would result in undue hardship. Indeed, the Defendants concede that, in cases of colorblindness, a lost limb, a lost eye, and brain damage, the Academy has accommodated students and allowed them to graduate. Accordingly, the Court finds that no undue hardship will result from allowing Lane to graduate and become a merchant marine officer. Indeed, the Court observes that the government will likely benefit greatly from his service.

C. The Court finds that the Defendants erred in failing to make an individualized inquiry into the particular facts of Lane's case.

The Court further finds that the Agency erred in failing to make an individualized inquiry into the particular facts of Lane's case. *See School Board of Nassau County v. Arline*, 480 U.S. 273 287, 107 S. Ct. 1123, 94

L.Ed.2d 307 (1987). The Defendants argue that such an individualized inquiry was unnecessary because an "'individualized inquiry' need be no more extensive than the facts of the case demand." *Carr v. Reno*, 23 F.3d 525, 530 (D.C. Cir. 1994). Here, they argue that the Academy's inquiry ended with Lane's disqualification under the blanket rule requiring cadets to meet reserve service requirements. At oral argument, the Defendants also relied upon *American Hosp. Ass'n v. N.L.R.B.*, 111 S. Ct. 1539, 1543, 113 L.Ed.2d 675 (1991) (*AHA*), for the proposition that an agency may establish rules of general applicability to guide its discretion in making the individualized determinations required by a particular statutory scheme.

Because the Court finds that the META does not impose a requirement that all students meet eligibility standards for commissioning in the armed forces reserve, the Court determines that the facts of Lane's case did demand a more thorough inquiry than simply confirming that he had diabetes mellitus. Moreover, the Court observes that the Defendants erred in creating a blanket restriction absent a specific determination by Congress that such restriction is necessary. *See Traynor v. Turnage*, 485 U.S. 535, 551 n.11, 108 S. Ct. 1372, 99 L.Ed.2d 618 (1988).

Finally, the Court further finds that *AMA* does not address the authority of federal agencies to interpret Section 504 of the Rehabilitation Act and, therefore, does not relieve the Defendants of the individualized inquiry requirement under Section 504. Defendants reply that the case affords the Defendants discretion in determining whether, and under what circumstances, a hardship exception to the requirements of the META shall be made. The Defendants state that the agency's decision to accommodate hardship cases only after cadets begin their third year is "eminently reasonable, since midshipmen do not incur a service obligation until their junior year." Defendants' Response to Plaintiff's

Supplemental Memorandum in Response to New Authority Cited by Government at Oral Argument, at 4.

The Court declines to make any findings regarding whether *AMA* entitles the Defendants to make blanket rules to guide their decisions regarding whether to waive the express requirements of the META upon a showing of hardship. Rather, the Court need not reach that question given its finding that the META does not require cadets to be commissionable in the armed forces reserve throughout their education. In short with respect to Lane's condition, there is no statutory rule to waive. Similarly, even in the Defendants' view, Lane did not even incur a service obligation while at the USMMA and, therefore, "he was not eligible for a waiver." *Id.* Thus the waiver provisions have no bearing on the Defendants' duty to conduct an individualized inquiry into the facts of Lane's situation. Thus the Court finds that the Defendants have not demonstrated that Congress has absolved the DOT of assuring that students at the USMMA will receive individualized determinations and reasonable accommodation under Section 504.

In sum, the Court finds that the Defendants have violated Section 504 of the Rehabilitation Act by separating Lane from the Academy based solely on his diabetes mellitus. In particular, the Court finds that meeting physical requirements for commissioning in the naval reserve is not an essential program requirement. Even if it were essential, however, the Court holds that the Defendants have not met their burden of showing that providing reasonable accommodation would result in undue hardship for the USMMA and, further, that the Defendants erroneously failed to make any individualized inquiry into the facts of the Plaintiff's case.

III. THE COURT FINDS THAT THE PLAINTIFF IS ENTITLED TO REINSTATEMENT TO THE ACADEMY FORTHWITH AND TO COMPENSATORY DAMAGES UNDER SECTION 504

"It is well-established that injunctive and declaratory relief are available under the Rehabilitation Act." *Doe v. District of Columbia*, 796 F. Supp. 559, 573 (D.D.C. 1992) (Hogan, J.).[11] In light of its finding that the Defendants violated section 504 of the Rehabilitation Act, the Court shall therefore order the Defendants to reinstate Lane to the Academy forthwith, and to take all steps necessary to permit Lane to resume his maritime training.

The parties remain in dispute, however, over whether the Plaintiff may recover compensatory damages against the government under Section 504 of the Rehabilitation Act.[12] For the following reasons, the Court finds that the Plaintiff, as the prevailing party, is entitled to compensatory damages under section 504.[13]

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[11] Section 504 specifically entitles a prevailing party to petition the Court for "a reasonable attorney's fee as part of the costs." 29 U.S.C. § 794a(b).

[12] As both parties observe, no federal court in a published decision has addressed the forms of relief, if any, available to a prevailing plaintiff under the META. Plaintiff's Motion, at 30 n.64; Defendants' Opposition, at 29. Thus both sides analyze Lane's entitlement to damages under Section 504 only. As the Court finds that the Defendants have violated Section 504, and as neither party has presented for decision the issue of whether the Plaintiff is entitled to recover damages under the META, the Court shall confine its discussion to the damages principles arising under the Rehabilitation Act.

[13] The Plaintiff seeks three components of compensatory damages, including (1) out-of-pocket expenses that Lane and his family incurred to procure an alternative college education for Lane after he was disenrolled from the USMMA; (2) loss of professional opportunity damages due to the delay of Lane's entry into his chosen career as a merchant marine officer; and (3) dam-

With respect to actions against private parties and local counties, the Defendants do not contest the conclusion that, "based on the Supreme Court's recent decision in *Franklin v. Gwinnett County Public Schools*, -- U.S. --, 112 S. Ct. 1028, 117 L.Ed.2d 208 (1992), compensatory damages are available under the Act." *Doe*, 796 F. Supp. at 571.[14] *See also Tanberg v. Weld County Sheriff*, 787 F. Supp. 970, 972 (D. Colo. 1992) (*Franklin* "provides dispositive analysis" for determining whether compensatory damages are recoverable under the Rehabilitation Act); *Kraft v. Memorial Medical Center*, 807 F. Supp. 785, 790-92 (S.D. Ga. 1992) (compensatory damages recoverable under section 504); *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 637 (1984) (plaintiffs may recover backpay under section 504). Rather, the Defendants assert primarily that the doctrine of sovereign immunity protects them from a damages suit for violation of Section 504, and contend that the Rehabilitation Act only affords a cause of action against private agencies. The Court cannot agree.

In the 1978 Amendment to the Rehabilitation Act, Congress specifically extended the Act's discrimination prohibition to "any program or activity receiving Federal

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ages for pain and suffering. The Court declines to rule at this time on the appropriate components of damages Lane may recover.

[14] In *Franklin*, the Supreme Court held that compensatory damages are available under Title IX of the Educational Amendments of 1972, 20 U.S.C. §§ 1681-1688 ("Title IX"), which bans sex discrimination in educational institutions that receive federal funds. Although the Court acknowledged that Title IX was silent on the availability of remedies, it found that its "reading of the two amendments to Title IX . . . lead [the Court] to conclude that Congress did not intend to limit the remedies available in a suit brought under Title IX." *Franklin*, 112 S. Ct. at 1035, 1036. The Supreme Court thus concluded that "a damages remedy is available for an action brought to enforce Title IX," as the Court "presume[d] the availability of all appropriate remedies unless Congress has expressly indicated otherwise." *Id.* at 1038, 1032.

financial assistance or any program or activity conducted by any Executive agency . . . ." 29 U.S.C. § 794. Prior to this amendment, Section 504 only prohibited handicap discrimination by private federal aid recipients.

In *Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1991), the Ninth Circuit held that the language and history of the 1978 Amendment reveal Congress's intent, "unequivocally expressed," "to put the federal government on equal footing with everyone else in making it subject to Section 504's prohibition of discrimination against the handicapped." *Id.* at 789, 792. Accordingly, the Court found that "Congress waived sovereign immunity and provided a private right of action for damages for discrimination claims against the United States under section 504 of the Rehabilitation Act." *Id.* at 799.

In *Doe*, a physician with Acquired Immune Deficiency Syndrome brought a Rehabilitation Act suit against the government when the Federal Bureau of Investigation ceased having its agents examined at the plaintiff's clinic, as had been its practice pursuant to an annually renewed procurement contract between the FBI and the clinic. The FBI argued that sovereign immunity cloaked them from suit under Section 504. In rejecting that claim, the Ninth Circuit reviewed the Amendment's legislative history in detail, and explained that, although "the [congressional] debates do not state outright that section 504 subjects federal agencies to private actions for money damages, they nevertheless unequivocally express Congress's intent to do precisely that." *Id.* at 792-93. Moreover, the Court observed that, at the time of the 1978 Amendment, Congress was aware that the courts had interpreted Section 504 to create a private right of action for victims of discrimination. *Id.* at 789-90. Thus it concluded that, because "Congress appended the new coverage to the end of the pre-existing sentence under which a private cause of action had been implied," congressional intent "that there be no distinction in [the statute's] enforcement against federal defendants" is

evident. *Id.* at 790. In *J.L. v. Social Sec. Admin.*, 971 F.2d 260, 270 (9th Cir. 1992), the Ninth Circuit affirmed its holding in *Doe*.

Persuaded by the Ninth Circuit's reasoning, the Court finds that Plaintiff Lane is entitled to recover compensatory damages against the Defendants. In particular, the Court finds that Congress's 1978 extension of the Rehabilitation Act to programs or activities conducted by Executive agencies demonstrates that Congress intended to make federal agencies such as the DOT liable for money damages stemming from discrimination against the handicapped in their programs.

In *Dorsey v. United States Dep't of Labor*, Civil Action No. 88-1898 (D.D.C. Feb. 10, 1993), *appeal filed*, Dk. No. 93-5080 (D.C. Cir. 1994), Judge Hogan found that, although the plaintiff's reading of Section 504 was a plausible one, Congress has not expressly authorized a damages remedy against the federal government under the Rehabilitation Act. With all due respect, the Court finds this position erroneous. Section 504 of the Rehabilitation Act prohibits discrimination under any program or activity that receives federal financial assistance. Because the 1978 amendments to Section 504 expressly extended the Act's discrimination provision to programs receiving federal financial assistance, the conclusion is inescapable that Congress contemplated that the federal government would be on "equal footing with everyone else" who discriminates against the handicapped. *Doe*, 941 F.2d at 792. The Court finds no reason to conclude that Congress intended to exclude rights or remedies as against the federal government when it gave the courts broad authority to enforce its statutory provisions requiring reasonable accommodation for the handicapped.

CONCLUSION

The Court concludes that the Defendants' actions with respect to Plaintiff Lane were not justified by the META

or the regulations promulgated thereunder. Moreover, the Court finds that, based on the language of the statute, the regulations, and the USMMA's inconsistent actions with respect to Lane as well as other disabled students, the Court need not defer to the agency's reading of the META as requiring Lane's ultimate disenrollment solely because of his diabetes mellitus.

In addition, the Court finds that the Defendants violated Section 504 of the Rehabilitation Act in separating Lane from the Academy, as they have failed to show that meeting the physical qualifications for commissioning in the armed forces reserve is an essential program requirement of the USMMA, they have not even attempted to make any reasonable accommodations for Lane's disability, and they failed to make an individualized inquiry into the particular facts of Lane's case. Finally, the Court finds that the Plaintiff is entitled to reinstatement forthwith as a student at the Academy, and that the Plaintiff is entitled to compensatory damages against the Defendants, as Congress has waived sovereign immunity to damages for discrimination claims under Section 504.

Accordingly, the Court shall grant the Plaintiff's Motion for Summary Judgment, deny the Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment, and enter judgment for the Plaintiff. The Court shall further order the Defendants to reinstate Lane as soon as practicable, and shall schedule a status conference, pursuant to Rule 16 of the Federal Rules of Civil Procedure, to set forth the framework for the just and speedy resolution of any outstanding issues with respect to damages.

October 26, 1994 /s/ Charles R. Richey

CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE, Plaintiff, v. FEDERICO PENA, et al., Defendants.	Civil Action No. 94-1608

ORDER

Upon consideration of the parties' cross-Motions for Summary Judgment, the applicable law, the oral arguments of counsel, the entire record, and for all of the reasons articulated in this Court's Memorandum Opinion issued of even date herewith, the Court finds that the Plaintiff's Motion for Summary Judgment shall be granted, and the Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment shall be denied. The Court shall therefore direct that judgment be entered for the Plaintiff, and shall order the Defendants to reinstate forthwith the Plaintiff as student at the United States Merchant Marine Academy, and to allow the Plaintiff to resume his maritime training as soon as practicable.

Further, the Court has determined that a status conference shall be scheduled, pursuant to Rule 16 of the Federal Rules of Civil Procedure, at which the parties shall be prepared to address the framework for the just and orderly resolution of any outstanding issues regarding damages.

Accordingly, it is, by the Court, this 26th day of October, 1994

ORDERED that the Plaintiff's Motion for Summary Judgment shall be, and hereby is, GRANTED, except as to the amount of damages and costs; and it is

FURTHER ORDERED that the Defendants' Motion to Dismiss or, in the alternative, for Summary Judgment shall be, and hereby is, DENIED; and it is

FURTHER ORDERED that judgment shall be, and hereby is, ENTERED in favor of the Plaintiff on the issue of liability; and it is

FURTHER ORDERED that the Defendants shall reinstate Plaintiff Lane as a student at the United States Merchant Marine Academy forthwith and shall take all steps necessary to ensure that Plaintiff Lane resumes his maritime training at the Academy as soon as practicable; and it is

FURTHER ORDERED that counsel for both parties shall appear before the Court at 11:00 on November 16, 1994, for a status conference, to be held pursuant to Rule 16 of the Federal Rules of Civil Procedure, at which the parties shall be prepared to discuss the framework for the just and orderly resolution of any outstanding issues regarding damages.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

QUESTION PRESENTED

Whether Congress waived the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, which prohibits discrimination on the basis of disability in "any program or activity conducted by any Executive agency." 29 U.S.C. 794(a) (Supp. V 1993).

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-365

JAMES GRIFFIN LANE, PETITIONER

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) is not reported. The district court opinion on the issue of petitioner's entitlement to damages (Pet. App. 5a-7a) is not reported.

JURISDICTION

The decision of the court of appeals was entered on June 5, 1995. The petition for a writ of certiorari was filed on September 5, 1995 (the day after a legal holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. This suit arises from petitioner's discharge from the Merchant Marine Academy in December of 1992. The United States Merchant Marine Academy (MMA) is a federal service academy that trains men and women to serve as commercial merchant marine officers and as commissioned officers in the United States armed forces. The MMA is administered by the Maritime Administration, a unit within the Department of Transportation. Pet. App. 15a & n.3.

Petitioner applied for an appointment to the MMA in 1990. After passing a physical examination administered by the Department of Defense and meeting the MMA's other requirements for appointment, petitioner entered the Academy in July, 1991. Pet. App. 15a-16a. Subsequent to his entry to the Academy, a private physician diagnosed petitioner as having diabetes mellitus. *Id.* at 16a. After a hearing before the MMA's Physical Examination Review Board confirming petitioner's condition, the Academy Superintendent notified petitioner that he would be separated from the MMA at the end of the semester, in December 1992. *Id.* at 18a. The Superintendent advised Lane that diabetes disqualified him for military service, thus rendered him ineligible to be commissioned for service in the Navy/Merchant Marine Reserve Program, and required his discharge from the Academy. *Id.* at 17a, 18a.

b. Petitioner filed suit in the United States District Court for the District of Columbia, contending that his dismissal from the Academy violated the Maritime Education and Training Act of 1980 (META), 46 U.S.C. App. 1295 *et seq.*, and Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C.

794(a) (Supp. V 1993). Pet. App. 12a. He sought immediate reinstatement to the Academy and compensatory damages, including out-of-pocket expenses, loss of professional opportunity, pain and suffering, attorneys' fees, and costs. *Ibid.* On October 26, 1994, the district court granted summary judgment, entered judgment for petitioner, and ordered his immediate reinstatement to the Academy. *Id.* at 11a-61a. Petitioner re-enrolled at the Academy and resumed his studies. Pet. 5 & n.5.

The district court initially ruled that petitioner also was entitled to compensatory damages under Section 504 of the Rehabilitation Act. See Pet. App. 11a-61a. On December 16, 1994, however, the D.C. Circuit ruled in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (1994), that the Rehabilitation Act did not waive the federal government's sovereign immunity against money damages for violations of Section 504 of the Act. The court of appeals held that, under this Court's sovereign immunity jurisprudence, see *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), such waivers must be explicit and unambiguous. See 41 F.3d at 1554-1555. The court found no such explicit language in either Section 504 or Section 505 of the Rehabilitation Act. *Ibid.* The court noted that Section 505 explicitly incorporates the remedies of Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.*, for violations of Section 504, 41 F.3d at 1554, but it found no explicit waiver of sovereign immunity against money damages in Title VI. 41 F.3d at 1555. The court of appeals emphasized that the fact "[t]hat damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary

relief, sovereign immunity puts the federal government on a different footing [from] private parties." 41 F.3d at 1555. In examining the legislative history of Section 504, the court of appeals found it "at the very best * * * ambiguous." *Ibid.* The court expressly recognized that its decision respecting liability for damages for violations of Section 504 was in conflict with the Ninth Circuit's contrary decision in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (1991). 41 F.3d at 1555.[1]

In light of *Dorsey*, the district court vacated its prior ruling and held that petitioner is not entitled to monetary damages. Pet. App. 5a-7a.

2. The court of appeals summarily affirmed. Pet. App. 1a-2a.

DISCUSSION

The decision of the court of appeals, although correct, conflicts with decisions of the Court of Appeals for the Ninth Circuit on the question whether Congress has waived the federal government's sovereign immunity against money damages for violations of Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a) (Supp. V 1993). The availability of money damages against the federal government for violations of Section 504 is a question of substantial

[1] In *Dorsey*, the court of appeals noted that neither Section 504 nor Title VI expressly provides for a right of action for compensatory damages. 41 F.3d at 1554. The Ninth Circuit in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (1991), held that an implied cause of action exists for damages for violations of Section 504. The *Dorsey* court did not find a need to resolve that issue because it concluded that "[e]ven if there is an implied right of action for damages under Title VI, and thus under § 504, it cannot exist as against the federal government." 41 F.3d at 1554-1555.

importance to the United States and is a matter on which there should be uniformity in the lower courts. Accordingly, the United States agrees with petitioner that plenary review by this Court is warranted.

1. The decision of the court of appeals in this case is a summary affirmance of the district court ruling based on the earlier decision in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994). In *Dorsey*, the court held that Congress did not waive the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act. That ruling conflicts with the Ninth Circuit's rulings in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (9th Cir. 1991), and *J.L.* v. *Social Security Admin.*, 971 F.2d 260 (9th Cir. 1992).

2. The *Dorsey* decision and the summary affirmance by the court of appeals in this case are correct. It is well settled that waivers of sovereign immunity must be unequivocally expressed and not implied. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986); *Lehman* v. *Nakshian*, 453 U.S. 156 (1981); *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); see also *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234, 242-243 (1985). This Court recently reaffirmed that waivers of sovereign immunity must not be enlarged beyond what the statutory language requires, and that, for money damages to be available, waiver must unambiguously extend to monetary claims as well. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 34 (1992). Nor can the legislative history of a statute supply an unequivocal waiver that does not exist in the statute itself—"the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text." *Ibid.*

The court of appeals correctly ruled in *Dorsey* that Congress did not explicitly waive the federal government's sovereign immunity against money damages for violations of Section 504 of the Rehabilitation Act. Section 504(a) of the Act bars federal aid recipients and federal executive agencies from discriminating on the basis of disability in programs and activities. Section 504(a) provides, in relevant part, that:

> [n]o otherwise qualified individual with a disability in the United States * * * shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

29 U.S.C. 794(a) (Supp. V 1993).

Section 505(a)(2) of the Act specifies the remedies available for violations of Section 504. It provides that

> [t]he remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [section 504 of the Act].

29 U.S.C. 794a(a)(2).

Title VI of the Civil Rights Act of 1964 prohibits programs receiving federal financial assistance from discriminating on the basis of race, color or national

origin. 42 U.S.C. 2000d.[2] Title VI contains no provision specifying remedies against recipients of federal financial assistance who engage in discrimination other than in Section 2000d-7, which was enacted in 1986 to waive the States' Eleventh Amendment immunity. See pp. 9-10, *infra*. That Section provides that remedies in suits against States are available to the same extent as available against any public or private entities. The remedial provisions of Title VI generally deal with the authority and responsibilities of federal agencies that extend financial assistance to enforce Title VI.

The court of appeals correctly found that neither the Rehabilitation Act nor Title VI contains an explicit waiver of the federal government's sovereign immunity against money damages for violations of Section 504. In the remedies provision of Section 505(a)(2), Congress did not refer to persons aggrieved by acts of executive agencies. The absence of an express waiver for money damages for violations of Section 504 by executive agencies is especially obvious in light of the remedies provided for violations of Section 501 of the Act, 29 U.S.C. 791 (Supp. V 1993). Section 501 governs the federal government's liability for employment discrimination based on disability. See, *e.g.*, *Johnston* v. *Horne*, 875 F.2d 1415, 1418-1420 (9th Cir. 1989). With respect to violations of Section

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[2] Title VI provides, in relevant part:

> No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

42 U.S.C. 2000d.

501, Section 505(a)(1) of the Act provides that any aggrieved employee or applicant for employment is entitled to the remedies, rights, and procedures provided by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e-16 (Supp. V 1993). 29 U.S.C. 794a(a)(1). Prior to 1991, Title VII did not authorize any awards of compensatory damages. In 1991, however, Congress enacted the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, which provides that compensatory damages are available for unlawful intentional discrimination with respect to employment practices under Title VII and the Rehabilitation Act, 29 U.S.C. 794a(a)(1). 42 U.S.C. 1981a(a)(1) and (2) (Supp. V 1993). In the 1991 Act, Congress thus for the first time waived immunity for compensatory damages for intentional discrimination in violation of Section 501. No similar waiver has ever been enacted with respect to Section 504.

Petitioner argues (Pet. 18-19) that Congress meant to put the United States on an equal footing with private defendants who violate Section 504. The fact that compensatory damages may be available against private or state defendants for violations of Section 504, however, cannot supply the unequivocal waiver of the federal government's immunity against such damages required by this Court's precedents.

Petitioner relies (Pet. 19) on one Senator's comments fourteen years after the enactment of the 1978 amendment that added executive agencies to Section 504's coverage. Legislative history, however, cannot supply the requisite unambiguous statutory waiver. See *Nordic Village, Inc.*, 503 U.S. at 37. In addition, the contemporaneous legislative history of the 1978 amendments "utter[s] not a word about

relinquishing the government's immunity from damages." *Dorsey*, 41 F.3d at 1555.

Petitioner's reliance (Pet. 20-22) on this Court's decision in *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60 (1992), and earlier cases is misplaced. In *Franklin*, the Court held that, in a case where a cause of action against private parties and local counties was implied under Title IX of the Education Amendments of 1972, 20 U.S.C. 1681 *et seq.*, a court may award any appropriate relief. *Franklin* did not address the federal government's sovereign immunity against awards of money damages. In *Bell* v. *Hood*, 327 U.S. 678 (1946), also relied upon by petitioner, the Court held that the district court had jurisdiction over that suit, which claimed an entitlement to money damages for alleged unconstitutional actions by federal officers, but the Court did not rule on the merits of the issue. 327 U.S. at 684. Nor does the Court's ruling in *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), conflict with the requirement of an unambiguous waiver. In that case, Congress had authorized government payment to mail carriers; the Court held that the court of appeals had jurisdiction to issue a writ of mandamus for that ministerial act. 37 U.S. (12 Pet.) at 609-610.

Contrary to petitioner's contention (Pet. 19-20), the 1986 amendments to the Rehabilitation Act do not supply an unequivocal waiver of sovereign immunity. In 42 U.S.C. 2000d-7(a)(1) and (2), Congress waived the States' immunity under the Eleventh Amendment to liability for violations of Section 504, making available remedies against States "to the same extent as such remedies are available * * * against any public or private entity other than a State." 42 U.S.C. 2000d-7(a)(2). That waiver of state immunity has no rele-

vance to the federal government's immunity. Indeed, Congress's 1991 waiver of sovereign immunity for compensatory damages for intentional discrimination violating Section 501 of the Rehabilitation Act would have been superfluous if a waiver for damages had already existed under the 1986 amendments. See 42 U.S.C. 1981a(a)(2) (Supp. V 1993).

Finally, petitioner asserts (Pet. 16-17) that victims of discrimination are entitled to full redress for their injuries and that money damages are necessary to deter future statutory violations. But, "[w]hen it comes to monetary relief, sovereign immunity puts the federal government on a different footing [from] private parties." *Dorsey*, 41 F.3d at 1555. It is up to Congress to determine the remedies it wishes to authorize against the federal government in particular statutory schemes.

3. The issue of whether Congress has waived the federal government's immunity against money damages for violations of Section 504 of the Rehabilitation Act is a question of substantial importance to the United States, as well as to victims of discrimination in violation of Section 504. This question should be resolved uniformly under the federal statutory scheme regardless of the jurisdiction in which suit is brought. Review by this Court to resolve the existing conflict among the circuits is therefore warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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NOVEMBER 1995

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No. 95-365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, *ET AL.*,

Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF THE BLIND, BAZELON CENTER FOR MENTAL HEALTH LAW, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, EPILEPSY FOUNDATION OF AMERICA, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION AND ADVOCACY SYSTEMS, NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL MULTIPLE SCLEROSIS SOCIETY, NATIONAL PARENT NETWORK ON DISABILITIES, THE ARC, UNITED CEREBRAL PALSY ASSOCIATIONS, AND WORLD INSTITUTE ON DISABILITY, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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IN THE

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Respondents.

On Petition for A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICI CURIAE* AMERICAN COUNCIL OF THE BLIND, *ET AL.*, IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

STATEMENT OF INTEREST OF *AMICI CURIAE* [1]

Amici American Council of the Blind, *et al.* are thirteen national advocacy and service organizations that represent and serve the 49 million Americans with disabilities and their families. Each organization is actively involved in working to eliminate historical stereotypes, prejudices and the resulting

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1 This brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk.

discriminatory practices and policies that serve to exclude Americans with disabilities from participating as valued and contributing members of our society.

Amici know through experience that the availability of monetary damages to redress violations of civil rights is essential to enforce the guarantee of equal citizenship that has been provided to Americans with disabilities by federal law. In the Petition for A Writ of Certiorari, James Griffin Lane invites the Court to resolve a legal question on which the U.S. Circuit Courts of Appeal are currently in conflict, specifically the question of whether suit for monetary damages will lie against the federal government under Section 504 of the Rehabilitation Act of 1973. *Amici* recognize that Supreme Court interpretations of Section 504, particularly with respect to issues on which lower courts are divided, have a substantial impact on whether the federal mandate of nondiscrimination based on disability will be realized. This is especially true in cases, such as this one, involving construction of the federal government's own liability under this statute, given the broad reach and scope of federal activities, and the pivotal leadership role assigned to the federal government under national civil rights laws. *Amici* therefore submit the following brief in support of petitioner.

Amicus American Council of the Blind (ACB) is the nation's largest nonprofit membership organization of people who are blind or visually impaired. ACB seeks to ensure that blind individuals have the opportunity to participate fully in all aspects of American life and to that end works to promote strong state and federal anti-discrimination laws.

Amicus Bazelon Center for Mental Health Law is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in this Court in more than a dozen additional cases.

Amicus Disability Rights Education and Defense Fund (DREDF) is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

Amicus Epilepsy Foundation of America is a national nonprofit corporation founded in 1968 to advance the opportunities of the two million persons with epilepsy. The Foundation has a long-standing commitment to eliminating the stereotypes and prejudices that serve to exclude persons with epilepsy from society.

Amicus National Alliance for the Mentally Ill (NAMI) is a national grassroots advocacy organization of families of people with severe mental illnesses and people with these illnesses themselves. Comprised of 140,000 members, with more than 1,000 local affiliates in every state, NAMI's goals are to educate the public about severe mental illnesses and to advocate for the advancement of treatment and services for people with these illnesses. An important part of NAMI's mission is to combat stigma and discrimination against people with severe mental illnesses.

Amicus National Association of the Deaf (NAD) is a national nonprofit organization whose members are deaf adults, parents of deaf children, and professionals in the area of service to individuals who are deaf. NAD is the largest consumer organization of people who are deaf in the United States.

Amicus National Association of Protection and Advocacy Systems (NAPAS) is the national voluntary membership organization of the Protection and Advocacy Systems and Client Assistance Programs. The member agencies of NAPAS are designated by the Governor of their state or territory, and are federally mandated to pursue legal, administrative, and other remedies to protect and promote the legal rights of persons with disabilities. In FY 94, these

agencies provided services to nearly 70,000 persons, reflecting the full spectrum of disabling conditions.

Amicus National Council on Independent Living (NCIL) was established in 1982 as the national voice of independent living centers, which provide advocacy, information and referral services, independent living skills training and peer counseling to people with all disabilities, and which are governed and controlled by people with different types of disabilities. NCIL conducts and coordinates the national advocacy efforts of the Independent Living Movement. and works to ensure that the civil rights of people with disabilities are strengthened and protected by law.

Amicus National Multiple Sclerosis Society (NMSS) is a nonprofit organization which is comprised of 140 chapters and branches with 430,000 members nationwide. Since it was organized in 1946, in its 50 years of service NMSS has been dedicated to ending the devastating effects of multiple sclerosis (MS). As part of its mandate, NMSS promotes laws to overcome discrimination and provide strong remedies for violations of the civil rights of people with disabilities.

Amicus National Parent Network on Disabilities (NPND) is a national membership organization that represents over one million parents and families who have a member with a disability. NPND's mission is to speak as a collective voice representing the perspectives, needs and interests of parents and family members of persons with disabilities.

Amicus The Arc is the largest voluntary organization in the country devoted to securing the rights of, and effective services for, the approximately 7,200,000 Americans with mental retardation. The Arc has a national membership of approximately 120,000 people, including persons with mental retardation and their parents, and has approximately 1,100 state and local chapters throughout the country. Members of Congress, state legislatures, rulemaking authorities, and the courts regard The Arc as a leading advocate for citizens with mental retardation.

Amicus United Cerebral Palsy Associations (UCPA) is a national nonprofit voluntary health organization founded in 1949, which has as its mission to affect positively the quality of life for persons with cerebral palsy and also others with severe disabilities and multiple service needs and the families of both. UCPA assists its 152 affiliates throughout the country in the provision of direct services as well as education and advocacy programs, and other activities advancing the independence, productivity and full citizenship of people with disabilities.

Amicus World Institute on Disability (WID) is a private, nonprofit corporation focusing on major policy issues from the perspective of the disabled community. Founded in 1983 by persons who have been deeply committed to the independent living movement, WID functions as a research center and as a resource for information, training, public education and technical assistance.

SUMMARY OF ARGUMENT

This Court should grant certiorari to resolve a clear split in the Courts of Appeal on a legal issue affecting the federal civil rights of 49 million Americans with disabilities, and to ensure that petitioner is afforded the monetary damages intended by Congress to remedy the illegal discrimination that he has suffered at the hands of the federal government.

Federal appellate courts are starkly divided on the sole legal issue presented by the Petition: whether Section 504 of the Rehabilitation Act of 1973 authorizes monetary damages against the federal government. The Ninth Circuit has held that it does. See, *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991); *J.L. & K.P. v. Social Security Administration*, 971 F.2d 260 (9th Cir. 1992). In the instant case, the D.C. Circuit has held that it does not. *Lane v. Pena*, Civ. No. 94-1608 (D.C. Cir. June 5, 1995), relying on *Dorsey v. United States Dept. of Labor*, 41 F.3d 1551 (D.C. Cir. 1994). The Court long has recognized the

resolution of such conflicts as one of its core functions. See, *infra*, section I.

A grant of certiorari also is called for in this case because it presents an issue of national significance. See, *infra*, section II. Petitioner poses a question critical to simple justice for a group -- people with disabilities -- who "are the poorest, least educated and largest minority in America." [2] The 1978 Amendments to Section 504, which extended that statute's coverage to the federal government, were motivated by Congressional appreciation of the scope and impact of government activities on the lives of Americans with disabilities. The extent of monetary damages caused by federal disability discrimination, and the importance of the right to recover such damages, is underscored by the fact that persons with disabilities are disproportionately represented among persons who are eligible for and benefit from many federal government programs. See, e.g., *Dorsey* (involving the federal Job Corps program, which provides services to 100,000 youths each year); and *J.L.* (involving the federal Supplemental Security Income program, which provides benefits to approximately 6 million Americans).

The record in this case clearly frames the legal question presented. See, *infra*, section III. The government does not dispute that petitioner Lane is entitled to the protection of Section 504, that Mr. Lane is qualified for enrollment in the U.S. Merchant Marine Academy, or that the government violated Section 504 by disenrolling him on the basis of his diabetes. Moreover, the parties have stipulated to the amount of petitioner's damages. Thus, the sole remaining issue is whether the federal government is liable for such damages.

The Court should grant the writ to reverse the erroneous decision of the District of Columbia Circuit, which threatens to seriously undermine the civil rights of people with disabilities subject to invidious discrimination by the federal

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2 Senate Comm. on Labor and Human Resources, The Americans with Disabilities Act, S. Rep. No. 101-116, 101st. Cong., 1st Sess. at p. 9 (1989)(quoting U.S. President George Bush).

government. See, *infra*, section IV. The court below failed to give proper weight to compelling arguments that the text of Section 504, as well as the history of the law and its amendments, establish that Congress effected a waiver of sovereign immunity so as to create a damages remedy against the federal government under Section 504.

In particular, the Court below failed to adequately account for this Court's decision in *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992), that all appropriate remedies, including monetary damages, are available against an entity subject to liability under Section 504, and failed to recognize the clear Congressional intent in the 1978 Amendments to Section 504 to provide against the federal government the same remedies provided against non-federal parties.

Finally, the Court of Appeals erred in holding that *U.S. v. Nordic Village* 112 S. Ct. 1011 (1992) requires judgment for the government. Petitioner has shown an "unequivocal waiver" of sovereign immunity as required by *Nordic Village* and numerous prior decisions of this Court. To the extent *Nordic Village* changed the law -- in 1992 -- by holding that legislative history has no bearing on construction of such waivers, it is inapplicable to construction of Congress's intent in 1978 in amending Section 504. Even after *Nordic Village*, the Supreme Court has construed the scope of waivers of sovereign immunity with attention to legislative history and the context in which Congress acted. See, e.g., *Smith v. United States*, 113 S. Ct. 1178 (1993). All of these authorities dictate that Section 504 damages suits will lie against the federal government. The Court should grant certiorari to clarify this important federal civil rights law issue.

ARGUMENT

I. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THERE IS A DIRECT SPLIT OF AUTHORITY IN THE CIRCUIT COURTS OF APPEAL ON THE QUESTION OF WHETHER SECTION 504 AUTHORIZES SUIT FOR MONETARY DAMAGES AGAINST THE FEDERAL GOVERNMENT

On appeal of the instant case, the District of Columbia Circuit Court of Appeals summarily held, based on prior Circuit precedent, that suit would not lie against the federal government for monetary damages resulting from discrimination on the basis of disability, because Congress had not waived federal sovereign immunity to such suit under Section 504 of the Rehabilitation Act of 1973. *Lane v. Pena*, Civ. No. 94-1608 (D.C. Cir. June 5, 1995). [3]

In so ruling, the D.C. Circuit is in direct conflict with the Ninth Circuit's holdings that Congress has clearly authorized a damages remedy to redress federal government violations of Section 504's disability nondiscrimination mandate. *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991); *J.L. & K.P. v. Social Security Administration*, 971 F.2d 260 (9th Cir. 1992). Indeed, the D.C. Circuit cited and deliberately rejected the Ninth Circuit's *Doe* decision, thereby establishing an express split of authority among the U.S. Circuit Courts of Appeal.

Certiorari should be granted in this case pursuant to this Court's admonition that a principal purpose of certiorari

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3 The District of Columbia Circuit's June 5, 1995 order in the *Lane* case summarily affirmed the ruling of the lower court that damages are unavailable against the federal government, based on the Circuit Court's holding in *Dorsey v. United States Dept. of Labor*, 41 F.3d 1551 (D.C. Cir. 1994). While the *Dorsey* case originally established the conflict with Ninth Circuit precedent on this issue, the instant case presents an appropriate vehicle for resolution of this conflict, as noted by Mr. Lane in his Petition For A Writ of Certiorari ("the Petition") at p.13, n.13.

jurisdiction is to resolve such circuit conflicts. *Braxton v. United States*, 500 U.S. 344, 347 (1991); S. Ct. R. 10 (a) (effective Oct. 2, 1995).

II. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE ISSUE PRESENTED HAS A SUBSTANTIAL IMPACT ON THE 49 MILLION AMERICANS WITH DISABILITIES WHO ARE AFFORDED CIVIL RIGHTS PROTECTIONS UNDER SECTION 504

The question of whether Section 504 authorizes a damages remedy to redress disability discrimination by the federal government is of substantial concern to the 49 million Americans with disabilities---the largest minority group in the country, at approximately 20% of the U.S. population---who are afforded civil rights protections under the Rehabilitation Act. [4]

It was recognition of the interests and needs of Americans with disabilities, and specifically recognition of the injustice and hardship that results from disability discrimination, that prompted Congress to enact Section 504 in 1973, thereby prohibiting such discrimination by recipients of federal financial assistance. Consistent with the desire to eradicate barriers faced by persons with disabilities throughout all sectors of society, the 1978 Amendments to the Rehabilitation Act extended Section 504's coverage to the federal government itself. The 1978 Amendments were clearly motivated by Congressional appreciation of the reach and scope of federal government activities, and their impact

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4 The most recent U.S. Census Bureau data establish that there are 48.9 million Americans with some type of disability, representing 19.4% of the total population of the United States. Moreover, this percentage is expected to increase as the population becomes increasingly composed of older individuals. Americans with Disabilities: 1991-92. U.S. Bureau of the Census, Current Population Report P70-33. Washington, D.C.: U.S. Government Printing Office.

and influence on the lives of Americans with disabilities. The significant extent of this federal impact is clearly demonstrated by the type of facts that have been presented to courts in Section 504 cases.

In the instant case, for example, petitioner was delayed for two years, due to disability discrimination, in pursuing his post-secondary education at the U.S. Merchant Marine Academy, and thereby delayed in accessing the employment opportunities afforded to Academy graduates. His vulnerability to federal discrimination parallels that of other individuals with disabilities who wish to pursue educational opportunities in federally operated schools.

The plaintiff in the *Dorsey* case is representative of the thousands of economically and vocationally disadvantaged individuals with disabilities who seek to access the federal Job Corps program, which is administered by the U.S. Department of Labor to provide training and education for economically disadvantaged individuals between the ages of 14 and 22.[5] Similar to petitioner Lane, plaintiff Dorsey's participation in a federal educational program was interrupted by discrimination on the basis of disability, in his case when he was expelled from the Job Corps because he was HIV positive. As with petitioner Lane, Mr. Dorsey experienced damages resulting from unemployment and lost educational and vocational opportunities as well as emotional distress.

The Ninth Circuit's *J.L.* case involved the issue of accommodating persons with mental disabilities applying for federal Supplemental Security Income (SSI).[6] The

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5 The Job Corps program currently provides services nationwide to approximately 100,000 youths each year. Approximately 44,000 new youths are enrolled each year as a consequence of normal program turnover.

6 The most recent data available from the Social Security Administration establish that 5,984,234 persons received SSI during 1993. The data also establish that the number of persons receiving federally administered payments has been steadily rising since the SSI program began in 1974 (there were 3.2 million persons who received SSI benefits during this inaugural year, and with few exceptions the number of recipients has increase each year since then). See "Fast Facts

complexity and rigidity of the benefits application process in *J.L.* was alleged by plaintiffs to have created insurmountable barriers for precisely the persons the SSI program was intended to assist. Congress designed the SSI program, like other federal entitlement programs, in recognition of the dire needs of Americans trying to survive with incomes at or below the subsistence level. The importance of permitting recovery of the damages that can result from discriminatory denial of such entitlements---loss of subsistence income and its after effects---is underscored by the critical nature of the safety net such programs seek to create.[7]

& Figures About Social Security", U.S. Department of Health and Human Services, Social Security Administration, Office of Research & Statistics, SSA Publication No. 13-11785 at 23 (1994).

While statistics on the number of applicants for SSI are unavailable, at a minimum it can be documented that the over 5.9 million people who received SSI benefits in 1993 participated in the application process.

7 The extent of damages caused by federal government disability discrimination is underscored by the fact that persons with disabilities, such as the plaintiffs in *Dorsey* and *J.L.*, are disproportionately represented in the population of persons who are eligible for and in need of federal government programs providing vocational training, educational opportunities, and entitlement benefits.

For example, it is compelling to note that according to Louis Harris polls conducted in 1986 and 1987, two-thirds of Americans with disabilities between the age of 16 and 64 were not working at all, despite the fact that 66% of working age persons with disabilities indicated that they did want to work. 40% of adults with disabilities lack a high school diploma---three times more than non-disabled adults. See Louis Harris and Associates, The International Center for the Disabled (ICD) Survey of Disabled Americans: Bringing Disabled Americans Into the Mainstream. (1986). See also, The ICD Survey II: Employing Disabled Americans (1987).

These realities were noted by Congress, in the legislative history to the Americans with Disabilities Act of 1990 (ADA), as supporting a need for further disability rights legislation. This legislative history also takes note of the statement by President George Bush, who signed the ADA, that "statistics consistently demonstrate that disabled people are the poorest, least educated and largest minority in America." S. Rep. No. 101-116, 101st. Cong., 1st Sess. at p. 9 (1989).

It follows from these statistics that discrimination by the federal government in the conduct of programs serving the economically

Federal regulatory activity, which affects so many aspects of American society, has a similarly broad impact on the lives of persons with disabilities. For example, U.S. Department of Transportation regulations establish medical standards for interstate commercial truck drivers. Failure to comply with such standards will preclude employment in this field. To the extent that such standards illegally discriminate on the basis of disability, the federal government directly deprives persons with disabilities of this source of livelihood. [8]

As demonstrated by the above, federal programs providing educational and vocational opportunities, federal agencies providing entitlement benefits, and federal regulatory activities establishing employment qualifications have a dramatic effect on the lives of millions of persons with disabilities. To the extent that the federal government illegally discriminates in conducting such wide-ranging programs and activities, it causes substantial monetary damages of precisely

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disadvantaged has a correspondingly disproportionate impact on Americans with disabilities.

8 The following is offered as an illustration of the impact that federal regulatory activities can have. Pursuant to the direction of Congress as specified in the legislative history to the ADA, the U.S. Department of Transportation has undertaken a review of physical qualification standards for interstate commercial drivers of certain classifications of motor vehicles, to ensure that they are consistent with the requirements of Section 504 and the ADA. S. Rep. No. 101-116, 101st Cong., 1st Sess. 27-28 (1989); H.R. Rep. No. 101-485 (Part 2), 101st Cong., 2d Sess. 57 (1990).

As a result of this review, the Federal Highway Administration (FHWA) has instituted waiver programs involving drivers with diabetes and vision impairments. The FHWA's Diabetes Waiver Program currently has 122 enrolled drivers with that disability. As of August 1993, there were 2,656 drivers participating in the FHWA Vision Waiver Program, all of whom would have been denied interstate commercial driving privileges on the basis of disability but for the waiver. Preliminary data available as a result of the Vision Waiver Program indicate that, far from being a safety risk, Program participants are safer drivers than their non-vision impaired counterparts. See, Federal Highway Administration, Monitoring Drivers of Commercial Motor Vehicles Who Receive Vision Waivers (December 9, 1993).

the type for which a non-federal party would be clearly liable under Section 504.

This Court should grant certiorari to resolve the question of whether suit for such damages will lie against the federal government, in recognition of the significant impact of this issue on the lives of the 49 million Americans with disabilities.

III. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE INSTANT CASE IS A CLEAR VEHICLE FOR RESOLUTION OF THE LEGAL ISSUE PRESENTED

The record in this case clearly frames the legal question of whether suit for monetary damages will lie against the federal government under Section 504. Thus, *Lane* presents this Court with an ideal opportunity to resolve an important issue on which lower courts are in conflict.

As documented in the Petition, the federal government does not dispute in this case that petitioner Lane, who has diabetes, is an individual with a disability who is entitled to the protection of Section 504. The government has also chosen not to appeal judicial findings that Mr. Lane is qualified for enrollment in the U.S. Merchant Marine Academy, and that the government illegally discriminated against him in violation of Section 504 by disenrolling him on the basis of his diabetes.

Moreover, the parties to this case have entered into a joint stipulation specifying that, as a result of the government's discrimination, petitioner has sustained a total of $75,000 in damages, with further specification as to the monetary value of the lost income, out-of-pocket expenses, and pain and suffering that comprise the total damages award. See, Appendix C to the Petition at pp. 8a-10a.

There is thus no dispute as to the nature or amount of the damages at issue in this case, and no need for an offer of proof with respect to damages on remand. The only issue,

which is clearly presented by this case, is whether the federal government should be, as a non-federal party clearly would be, obligated to pay conceded damages to redress the injuries caused by its actions, which were found by a court in an undisputed holding to have been in violation of Section 504.

IV. THE PETITION FOR CERTIORARI SHOULD BE GRANTED BECAUSE THE DECISION OF THE D.C. CIRCUIT COURT WAS ERRONEOUS, AND REVIEW BY THIS COURT PROVIDES THE ONLY OPPORTUNITY TO REMEDY THE ILLEGAL DISCRIMINATION SUFFERED BY PETITIONER CONSISTENT WITH CONGRESSIONAL INTENT

A. The 1978 Amendments To Section 504 Were Intended To Put The Federal Government On "Equal Footing" With Non-Federal Parties, Which Are Clearly Subject To A Private Right Of Action For Monetary Damages Under The Rehabilitation Act.

As the Ninth Circuit has correctly noted, plain statutory language, buttressed by the legislative history of the Rehabilitation Act as articulated by Congress over the past two decades, makes it "starkly clear" that the 1978 Amendments to Section 504 were "intended to put the federal government on equal footing with everyone else" with respect to both the requirements and enforcement of the disability nondiscrimination mandate. *Doe v. Attorney General of the United States*, 941 F.2d 780, 792 (9th Cir. 1991); see also, *J.L. & K.P. v. Social Security Administration*, 971 F.2d 260 (9th Cir. 1992).

As recognized by this Court, it is clear that a private right of action for compensatory damages will lie against non-federal parties under Section 504. *Franklin v. Gwinnett County Public Schools*, 112 S. Ct. 1028 (1992). Indeed, the federal government itself has made this argument in *amicus*

briefs that it has filed in disability rights cases involving non-federal parties. See e.g., May 16, 1995 *Amicus* brief filed by the U.S. Department of Justice (DOJ) in *Tyler v. City of Manhattan, Kansas*, Civ. No. 94-3344 (10th Cir.) (arguing that private plaintiffs are entitled to damages for both intentional and unintentional discrimination); May 1993 DOJ *Amicus* brief filed in *Galloway v. Superior Court of the District of Columbia*, Civ. No. 91-0644 (D.C. Cir.) (arguing availability of damages). [9]

By equalizing federal and non-federal remedies in the 1978 Amendments to the Rehabilitation Act, Congress has thus subjected the federal government to a private right of action for monetary damages.

B. The 1978 Amendments Clearly Evidence The Necessary "Unequivocal Expression" Of Waiver Of Federal Sovereign Immunity To Suit For Monetary Damages.

Through the 1978 Amendments to Section 504 equalizing federal and non-federal remedies, Congress has clearly effected the necessary "unequivocal expression" of waiver of federal sovereign immunity for damages, as required by the body of case law most recently including *U.S. v. Nordic Village, Inc.*, 112 S. Ct. 1011 (1992).

As reaffirmed by *Nordic Village*, it is a settled rule of law that before Congress will be understood to have waived the federal government's sovereign immunity from suit, the waiver must be "unequivocally expressed." 112 S. Ct. at 1014 (1992).

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9 The *Tyler* case was brought under Title II of the Americans with Disabilities Act of 1990 ("The ADA"). However, the Justice Department's position as to the availability of damages under ADA is relevant because Title II expressly provides that the "remedies, procedures and rights set forth in Section 505 of the Rehabilitation Act of 1973 (29 U.S.C. § 794a) shall be the remedies, procedures, and rights this title provides . . . ." 42 U.S.C. § 12133. The *Galloway* case was brought under both the ADA and Section 504.

While generally waivers are not to be liberally construed, this Court has "on occasion narrowly construed exceptions to waivers of sovereign immunity where that was consistent with Congress's clear intent, as in the context of the 'sweeping language' of the Federal Tort Claims Act." *Nordic Village*, 112 S. Ct. at 1014 (citations omitted). [10]

This Court has also recognized that it should not "'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively.'" *Irwin v. Dept. of Veterans Affairs*, 111 S. Ct. 453, 467 (1990)(quoting *Bowen v. City of New York*, 106 S. Ct. 2022, 2029 (1986)(internal citations omitted)).

In applying the rule of law requiring "unequivocal expression" of Congressional waivers of sovereign immunity, judicial statutory construction of the scope of such waivers has historically taken into consideration legislative history and

10 Relatively broad construction of waivers, and corresponding narrow construction of exceptions to waivers, has often been applied to cases brought against the federal government under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e et seq. See, e.g., *Irwin*, 111 S. Ct. 453 (1990) (equitable tolling rule applicable to suits against private defendants also applies to suits against the federal government under Title VII); *Loeffler v. Frank*, 486 U.S. 550 (1988) (prejudgment interest may be awarded in a suit against the U.S. Postal Service under Title VII); *Chandler v. Roudebush*, 425 U.S. 840 (1976)(plaintiff's right to trial *de novo* extends to suit against federal government as well as against non-federal parties).

Moreover, in cases in which this Court has ruled to the contrary in Title VII cases, the holding has been grounded in clear evidence that Congress did not intend equal treatment of federal and non-federal parties. See, e.g., *Library of Congress v. Shaw*, 478 U.S. 310 (1986)(Congressional awareness of long-standing "no interest" rule against the federal government precludes finding waiver as to interest absent explicit statement to that effect in Title VII); *Brown v. General Services Administration*, 425 U.S. 820 (1976)(precisely drawn, detailed statutory structure and legislative history of Title VII provides clear evidence that Congress intended it to be exclusive judicial remedy for claims of discrimination in federal employment).

Congressional intent of precisely the kind on which the Ninth Circuit based its decisions in *Doe* and *J.L.* [11]

Nevertheless, in the reasoning of the D.C. Circuit in *Dorsey*, the legislative history to which the Ninth Circuit looked in *Doe* and *J.L.* must be disregarded, because this Court's 1992 decision in *Nordic Village* has changed the law by holding that legislative history has no bearing on construction of waivers of federal sovereign immunity. Such a change in law, if indeed it has occurred, is clearly inapplicable to the interpretation of Section 504, given that the pronouncement to disregard legislative history is directly contrary to prior judicial statutory interpretation of which Congress can be presumed to have been aware when it enacted the Rehabilitation Act in 1973, and amended it in 1974, 1978, 1986 and 1990. See, *Cannon v. University of Chicago*, 441 U.S. 677 (1979); and *Cort v. Ash*, 422 U.S. 66 (1975)(identifying legislative history and intent as critical to judicial determination of whether a remedy has been created by statute).

Moreover, it should be noted that in cases after *Nordic Village*, even when basing decision on statutory language this Court has continued to construe the scope of waivers of sovereign immunity with attention to legislative history, legislative purpose and the context in which Congress acted. See, e.g., *Smith v. United States*, 113 S. Ct. 1178 (1993). In construing the Federal Tort Claims Act, the *Smith* court went so far as to note that "if it were quite clear from the balance of the statute" that a particular governmental liability was intended, statutory failure to specify such liability "might be

11 Cases where this Court has discussed and considered legislative history include, e.g., *Ardestani v. INS*, 112 S. Ct. 515, 520 (1991); *Loeffler v. Frank*, 486 U.S. 549 (1988); *Library of Congress v. Shaw*, 478 U.S. 310, 319 (1986); *Franchise Tax Board of California v. United States Postal Service*, 467 U.S. 512 (1984); *U.S. v. Mitchell*, 445 U.S. 535 (1980); *U.S. v. Kubrick*, 100 S. Ct. 352 (1979); *Brown v. General Services Administration*, 425 U.S. 820 (1976); *Chandler v. Roudebush*, 425 U.S. 840 (1976); and *U.S. v. King*, 89 S. Ct. 1501, 1503 (1969).

treated as a statutory gap that the courts could fill by decisional law." *Id.* at 1182. [12]

Thus, even after *Nordic Village*, it remains true that, far from requiring specific magic words in statutory text to effect a waiver, the relevant rule of decision is to avoid a "crabbed construction" that "overlooks our admonition that waiver of sovereign immunity is accomplished not by `a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying Congressional policy." *Franchise Tax Board*, 467 U.S. at 521. See also, *Dellmuth v. Muth*, 491 U.S. 223, 233 (1989)(Scalia, J. concurring) (Congressional elimination of state sovereign immunity is not precluded even if statutory text lacks explicit reference to such immunity or to the Eleventh Amendment).

Pursuant to the applicable body of case law regarding the construction of Congressional waivers of federal sovereign immunity, the statutory language and legislative history of the 1978 Amendments to Section 504 must be read to subject the federal government to suit for monetary damages.

C. Legislative History To The 1992 Reauthorization Of The Rehabilitation Act Expressly Reaffirmed The Availability Of A Monetary Damage Remedy Against The Federal Government, And Approved The Ninth Circuit's Decisions In *Doe* And *J.L.*

The Congressional intent to waive sovereign immunity and extend all of the protections of Section 504 to victims of

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12 It should also be noted that the body of case law developed under civil rights statutes such as Title VII clearly provides a more analogous model for this Court's evaluation of Section 504 than do cases such as *Nordic Village*, which involved construction of a provision of the Bankruptcy Code. See discussion at n.10, above.

discrimination by the federal government has been reaffirmed by the legislative history accompanying the 1992 reauthorization of the Rehabilitation Act of 1973.

In that history, Senator Jeffords, the primary author of the 1978 Amendments to Section 504, endorsed the statutory interpretations made by the Ninth Circuit in the Doe and *J.L.* cases, and expressly disapproved of cases similar to *Dorsey* that had held that no damage remedy lies against the federal government:

> [These decisions are] in direct contrast to rulings in the ninth circuit in *Doe v. Attorney General of the United States*, 941 F.2d 780 (9th Cir. 1991) and *J.L. v. Social Security Administration*, [971 F.2d 260 (9th Cir. 1992)], and the intent of Congress in 1978 to cover the Federal Government with the same anti-discrimination mandate which is applicable to private recipients of Federal financial assistance.

138 Cong. Rec. 16609 (October 5, 1992).

Senator Jeffords expressly endorsed the Ninth Circuit's pronouncement in the *Doe* case that:

> [t]he Rehabilitation Act's legislative history . . . demonstrates Congress's intent . . . to permit enforcement [against the federal government] through the same means available against private parties; enforcement in the courts with *damages* and equitable remedies.

Id., quoting *Doe*, *supra*, 941 F.2d at 793-794 (emphasis added).

The 1992 legislative history thus confirms that the "language of the 1978 amendments is sufficient on its face to confer" a "private right of action [for damages] against the Federal Government." 138 Cong. Rec. 16609. Indeed, in the words of Senator Jeffords, "[t]o construe the statute otherwise would be the height of hypocrisy, expecting private

entities to bear a burden that the Federal Government itself is unwilling to carry." *Id.*

In short, it is clear that statutory structure and legislative history of Section 504 are sufficient to provide the required "unequivocal expression" of waiver of federal sovereign immunity to suit for monetary damages. The District of Columbia Circuit Court of Appeals was thus in error in holding that suit for monetary damages will not lie against the federal government under Section 504. This Court should grant certiorari in this case to redress the D.C. Circuit's erroneous holding, and to afford petitioner the damages remedy to which he is clearly entitled by Congressional mandate.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

(7)

Supreme Court, U.S.
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No. 95-365

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET. AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

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BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The importance of a complete remedy for the violation of a right is deeply rooted in the common law. In commenting on Magna Carta, Lord Coke stated:

> "And therefore every Subject of this Realm, for injury done to him *bonis, terris, vel persona* [i.e. goods, lands, or person], . . . may take his remedy by the course of the Law, by any other subject . . . and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.
>
> "Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia [free, for nothing is more iniquitous than justice for sale]; Plena, quia Justitia non debit claudicare complete, for justice should not do things by halves]; & Celeris, quia dilatio est quaedam negatio [swift, for justice delayed is justice denied]; and then it is both Justice and Right.[1]

Indeed, for justice to do right it must be complete.

> "It is a vain thing to imagine a right without a remedy; for want of a right and want of a remedy are reciprocal.[2]

In more modern words, the value of a right is defined by the remedy available if that right is violated.

QUESTION PRESENTED

Should the executive agencies of the Federal Government,

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[1] Coke, *Second Institute* 55-56 (4th Ed. 1671) quoted in Thompson *Magna Carta: Its Role in Making of the English Constitution*, 1300-1629, at p. 365 (1948).

[2] *Ashby v. White*, 2 Raymond 953 (1703).

and only those agencies, be exempt from paying damages for harm caused by their violation of the Rehabilitation Act?

STATEMENT ABOUT *AMICUS*

Amicus Curiae, the American Diabetes Association ("Association") is the nation's oldest, largest and leading voluntary health organization addressing diabetes-related concerns. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The Federal Government impacts the lives of the more than 16 million Americans with diabetes in many and varied ways. The Federal Government is the largest single employer in the country and the executive agencies regulate and control many of the benefits, privileges and rights of people with diabetes. From the Veterans' Administration's provision direct medical benefits to the Department of Transportation's regulation of licensing of commercial truck-drivers, executive agencies have a pervasive influence on the care and employability of Americans with diabetes.

It is in this context that *amicus* urges this Court not to

eviscerate the protections of the Rehabilitation Act concerning discrimination by the Federal Government for Americans with diabetes.

ARGUMENT

NATIONAL POLICY REQUIRES THE FULL PROTECTION OF CIVIL RIGHTS FOR THE DISABLED AND THE OPPORTUNITY FOR FULL EQUITABLE AND LEGAL REMEDIES FOR THE VIOLATION OF THOSE RIGHTS.

A right without a remedy is a cruel irony and a fundamental injustice. In this case, the D.C. Circuit has declared that the Department of Transportation violated Lane's rights under the Rehabilitation Act and that he is entitled to reinstatement as a student at the United States Merchant Marine Academy, but is not entitled to recover the compensatory damages to which the parties have stipulated. This is a classic example of a right without a remedy and justice by "halves".

Lane's struggle with the Merchant Marine Academy is representative of the daily struggle of millions of persons with diabetes. Every day, Americans with diabetes face the consequences of prejudice, stereotyping and unfounded fear about diabetes, and especially the work capacity of Americans with diabetes. Although

Mr. Lane had his diabetes "under 'extremely good control'" and that he "repeatedly achieved an 'outstanding' rating on a physical readiness exam", he was denied the opportunity for education and employment as a merchant marine officer. The trial court in *Lane v. Pena* summarized Lane's ability most eloquently when he stated:

> ". . . the government, through taxpayer dollars, also made an investment in his training and, as Lane's record shows, their investment was a good one. It is undisputed that, if Lane continues to control his diabetic condition, he will make a fine merchant marine officer. . . ."
>
> "Indeed, the Court observes that the government will likely benefit greatly from his service." *Lane v. Pena*, 867 F.Supp. 1050, 1071-1072 (D.C. Cir. 1994).

This case exemplifies the need for the Rehabilitation Act to shield the most vulnerable of our citizens from arbitrary and irrational discrimination based upon "prejudice, stereotypes and unfounded fear."[3] If James Lane can be turned away so capriciously from the window of opportunity, then the shroud of prejudice shall darken the future for all disabled Americans. Lane's vindication

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[3] *School Board of Nassau County, Florida v. Arline*, 480 US 273 (1987).

needs to be twofold: his right to opportunity must be protected and the damage he suffered must be compensated. Lane must be made whole.

This Court has already recognized that the availability of damage awards in civil rights suits serve both the broad public purpose of eliminating discrimination and the private purpose of making the victims whole. *See*: *McKinnon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995); *Hensley v. Eckerhart*, 461 U.S. 424 (1993). The potential of a damage award deters discriminatory practices and induces compliance with legislative mandates to protect Americans against such discrimination. *See*: *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651-652 (1980); *Smith v. Wade*, 461 U.S. 30, 50 (1983).

How can we justify a technical argument that the executive agencies of the Federal Government, who by purpose and design protect the most vulnerable of our citizens from arbitrary and unreasonable practices, cannot be held responsible for the full consequences of their own discriminatory practices? How can we expect these agencies to protect the rights of disabled Americans if

they themselves cannot be held responsible for the full consequences of their own discriminatory practices? How do we impress upon these agencies that the law must be followed if the only consequence for their own discriminatory practices is equitable relief for a single person?

If the Rehabilitation Act is to accomplish its purpose, remedies for discriminatory practices must be sharply focused and uniformly applied. The remedy must reflect all of the consequences of discriminatory practices, including damages.

According to the most recent statistics, there are over 16 million Americans with diabetes, about 7% of our population. Unfortunately, new cases of diabetes are being diagnosed at the rate of approximately 1,800 per day or over 650,000 Americans each year.[4] Diabetes is a growing national health problem with significant economic impact. Over 50% of the Americans with diabetes are women. Nearly 10% of the Afro-American, Mexican-American,

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[4] *Diabetes Statistics*, National Diabetes Information Clearinghouse, National Institutes of Health (NIH Publication No. 96-3926) (1995).

Cuban-American and Puerto Rican-American ethnic and racial groups have diabetes while native Americans have nearly a 50% incidence rate of diabetes. As Americans age, the incidence of diabetes dramatically escalates.[5] The incidence of diabetes in the protected portions of our population (race, ethnic, gender and age) is large and is growing geometrically. Not only do our fellow Americans of various races, cultures and ethnic backgrounds face discriminatory practices based upon who they are, the fact that they have diabetes creates for some entities a further rationale for discrimination.

Americans with diabetes face serious health complications which include heart disease, stroke, high blood pressure, blindness, kidney disease, nerve disease, amputation, complications of dental disease and complications of pregnancy.[6] The life-long economic burden is enormous for Americans with diabetes.[7]

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[5] *Diabetes In America,* National Diabetes Data Group, National Institutes of Health (NIH Publication No. 95-1468) (1995).

[6] Ibid.

[7] Ibid.

Economic burdens of health care and minority status when added to discriminatory practices based on disability can be an overwhelming burden on a citizen's capacity to exercise his rights. To deny a full remedy for the enforcement of rights deters the pursuit of those rights to the detriment of both the individual and society. As "the poorest, least educated and largest minority in America", people with disabilities have enormous difficulty accessing legal representation and enforcing their basic civil rights. *See: City of Riverside v. Riviera*, 477 U.S. 561, 577 (1976); *S. Rep. No.* 101-116, 101st Congress, First Sess. at 9 (1989).

Those who are discriminated against because of their disability have the right to compensation for damages in every jurisdiction and against every defendant except against a federal agency in the District of Columbia. As a nation, we deal with the rights of ethnic and racial minorities and offer them protection and relief from the oppression of ignorance and prejudice. As a nation, we reach out for gender equality to create an equal opportunity for all of our citizens. As a nation, we protect thedisabled from denial of equal access and opportunity solely because of their disability.

Now, in the District of Columbia, various protected groups already under the panoply of the many and varied civil rights acts are confronted with a new barrier of inequality.

It is unacceptable that "prejudice, stereotypes and unfounded fear" about diabetes should be permitted to stop the progress toward equal opportunity and fair and equal treatment for persons with diabetes. The barrier created by the District of Columbia will chill the enforcement of the rights of the disabled under the Rehabilitation Act.

The trial court elaborated on the history of the inconsistent conduct by the Merchant Marine Academy where some, but not all, disabilities had triggered disenrollment and where there had been no individualized assessment of an outstanding student. Arbitrary and inconsistent decisions are the historical burdens suffered by persons with disabilities and, in particular, persons with diabetes. The present case highlights the need for complete remedies for vindicated rights because of arbitrary and inconsistent discriminatory practices.

A recent settlement in *Kenneth Dugger v. Lloyd M. Bentsen, Secretary, U.S. Dept. of Treasury, (C.D. Cal. 1994)* (Civil Case No.

93-2631) illustrates the recognition of the need to compensate for damages caused by discriminatory conduct towards a person with diabetes. Mr. Dugger filed his action under the Rehabilitation Act "to correct the unlawful employment practices in the job selection process and to make the plaintiff whole". Mr. Dugger's claim was based upon the fact that his diabetes was the sole cause of his non-selection as a criminal investigator (special agent) for the Department of Treasury. After winning his Motion for Summary Judgment on the substantive merits, Treasury agreed to compensate Mr. Dugger for lost retirement contributions, lost back pay, compensatory damages and attorney fees and costs for the litigation.

The *Dugger* case illustrates two important points. First, it is an articulation of the kinds of damages that are suffered by disabled persons when they are discriminated against and when they attempt to enforce their rights under the Rehabilitation Act. In Mr. Dugger's case settlement was for $67,000. If there was no hope of reimbursement, it would be the rare plaintiff that could afford to spend or risk this amount of money to pursue his rights no matter how egregious the discrimination. Second, the prospect of an

economic settlement forced additional accountability on the management within a federal agency. The potential of damages focuses the need to make lawful and responsible decisions. Without this economic accountability, there is no compelling pressure that will impact budgets and decision-makers so as to deter and discourage discriminatory practices.

V. CONCLUSION

Amicus, on behalf of 16 million Americans with diabetes, asks this Court to make Mr. Lane whole and provide the meaningful remedies of the Rehabilitation Act for disabled Americans when they are discriminated against by the Federal Government. Mr. Lane's Petition in this case stands for equal justice under the law and for a full and fair remedy under the Rehabilitation Act.

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No. 95-365 (4)

Supreme Court, U.S.
FILED
FEB 16 1996
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED SEPTEMBER 5, 1995
WRIT OF CERTIORARI GRANTED JANUARY 5, 1996

35 pp

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Memorandum and Order of the United States District Court for the District of Columbia, entered October 26, 1994 (Appendix D) ..... Pet. App.11a

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

C.A. No. 94-CV-1608

JAMES GRIFFIN LANE

v.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

RELEVANT DOCKET ENTRIES

DATE	NR	PROCEEDINGS
1994		
July 22	1	COMPLAINT filed by plaintiff(s) James Griffin Lane; jury demand (jeb) [Entry date 07/25/94]
July 22	2	MOTION filed by plaintiff(s) JAMES GRIFFIN LANE for preliminary injunction Exhibits 1-17. (jeb) [Entry date 07/25/94]
July 22	--	SUMMONS (5) issued to federal party(s) defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER, and non-parties: U.S. Attorney and U.S. Attorney General. (jeb) [Entry date 07/25/94]

July 28	--	STATUS HEARING before Judge Charles R. Richey: Reporter: Frank Rangus (jeb)
August 1	3	ORDER by Judge Charles R. Richey: consolidating the hearing on the plaintiff's motion for preliminary injunction with a final determination on the merits; cross motions due 4:00 8/19/94; response to cross motions due 4:00 9/2/94; reply to cross motions due 4:00 9/16/94; directing counsel file joint statement of undisputed material facts in this case due 8/19/49 [sic] at 4:00. (N) (jeb)
August 19	7	MOTION filed by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER to dismiss complaint [1.1], or in the alternative for summary judgment Exhibits (5) bulky pleading (1pp) [Entry date 08/22/94]
August 19	8	MOTION filed by plaintiff(s) JAMES GRIFFIN LANE for summary judgment, Exhibits (5) (1pp) [Entry date 08/22/94]
Sept. 2	9	RESPONSE by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER in opposition to motion for summary judgment [8-1] by JAMES GRIFFIN LANE, Exhibits (4) (1pp) [Entry date 09/08/94]
Sept. 2	10	RESPONSE by plaintiff(s) JAMES GRIFFIN LANE in opposi-

		tion to motion to dismiss complaint [1-1] [7-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA, motion for summary judgment [7-2] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA, Exhibits: (8). (1pp) [Entry date 09/08/94]
Sept. 7	12	SUPPLEMENTAL/DECLARATION of James Griffin Lane (1pp) [Entry date 09/12/94]
Sept. 16	13	NOTICE OF FILING by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER of the original signed declaration of Dr. William E. Evans and correction of an erroneously filed exhibit; attachments (2). (tth) [Entry date 09/19/94]
Sept. 16	14	REPLY by plaintiff(s) JAMES GRIFFIN LANE to response to motion for summary judgment [8-1] by JAMES GRIFFIN LANE; exhibits (4). (tth) [Entry date 09/19/94]
Sept. 16	15	REPLY by defendant FEDERICO PENA, defendant THOMAS MATTESON, defendant ALBERT J. HERBERGER to response to motion to dismiss complaint [7-1], and motion for summary judgment [7-2]; exhibits (7). (tth) [Entry date 09/19/94]
Oct. 26	21	MEMORANDUM OPINION by Judge Charles R. Richey (N) (jeb)

Oct. 26	22	ORDER by Judge Charles R. Richey: granting motion for summary judgment [8-1] by JAMES GRIFFIN LANE, except as to the amount of damages; denying motion to dismiss complaint [1-1] [7-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA; entering judgment in favor of the plaintiff on the issue of liability; directing defendants to reinstate plaintiff Lane as a student [at] the U.S. Merchant Marine Academy forthwith, and [take] steps necessary to ensure that plaintiff Lane resumes his maritime training at the Academy as soon as practicable; setting status call for 11/16/94 at 11:00 a.m. (N) (jeb)
Dec. 21	--	STATUS HEARING before Judge Charles R. Richey: hearing held. Reporter: Frank Rangus (dbw) [Entry date 12/22/94]
Dec. 21	27	JOINT STIPULATION filed [by] plaintiff and defendants regarding Defendant's Liability for damages. (N) (1pp) [Entry date 12/23/94]
Dec. 22	26	ORDER by Judge Charles R. Richey: response to motion to supplement the record due 4:00 1/13/95; vacating the Court's order of 10/26/94 only to the extent that it awards damages to the plaintiff; entering judgment in favor of the defendant solely on the issue of the plaintiff's entitlement to damages; Attachment (1) (N) (dbw)
Dec. 23	30	NOTICE OF APPEAL by defendant FEDERICO PENA, defendant

		THOMAS MATTESON, defendant ALBERT J. HERBERGER from order [22-1], entered on: 10/26/94. No fee paid U.S. Government (ted) [Entry date 12/27/94]
Dec. 27	--	TRANSMITTED PRELIMINARY RECORD on appeal [30-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA to U.S. Court of Appeals (ted)
1995		
Jan. 4	--	USCA #94-5405 assigned for appeal [30-1] by ALBERT J. HERBERGER, THOMAS MATTESON, FEDERICO PENA (ted) [Entry date 01/06/95]
Jan. 6	31	NOTICE OF APPEAL by plaintiff JAMES GRIFFIN LANE from order response to motion to supplement the record due 4:00 1/13/95; [26-1], order vacating the Court's order of 10/26/94 only to the extent that it awards damages to the plaintiff [26-2], order entering judgment in favor of the defendant solely on the issue of the plaintiff's entitlement to damages [26-3], order [26-4], entered on: 12/22/94, Filing Fee $5.00 and Docketing Fee $100.00 paid, Copies to Daniel B. Kohrman, Arthur B. Spitzer, Patricia M. Russotto. (1pp) [Entry date 01/09/95]

Jan. 9	--	TRANSMITTED PRELIMINARY RECORD on appeal [31-1] by JAMES GRIFFIN LANE to U.S. Court of Appeals (1pp)
Jan. 9	32	AMENDED NOTICE OF APPEAL by plaintiff JAMES GRIFFIN LANE from order [26-1] [26-2], [26-3], [26-4], entered on: 12/22/94, Filing and Docketing Fees Paid 1/6/95, Copies to: Walter A. Smith, Jr. and Patricia M. Russotto. (1pp) [Entry date 01/10/95]
Jan. 30	--	USCA #95-5006 assigned for appeal [32-1] by JAMES GRIFFIN LANE, appeal [31-1] by JAMES GRIFFIN LANE (1pp) [Entry date 01/31/95]
Mar. 1	39	CERTIFIED COPY of order filed in USCA dated 2/27/95, on appeal [30-1], dismissing appeal. USCA #94-5405 (cjp) [Entry date 04/24/95]
June 26	40	LETTER to Judge Charles R. Richey from Daniel B. Kohrman requesting Court to defer consideration of request for costs and attorney's fees until resolution of all proceedings which may occur in this case before the U.S. Supreme Court. "Let this be filed" Richey, J. (dbw) [Entry date 06/27/95]

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

C.A. No. 94-5405

JAMES GRIFFIN LANE

v.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1994	
Dec. 30	CIVIL-US case docketed. Notice of Appeal filed by Appellant Federico F. Pena, Appellant Thomas Matteson, Appellant Albert J. Herberger. [93799-1] (lrn)
1995	
Jan. 24	CLERK'S ORDER filed to consolidate cases on cross-appeals [97867-1]. Directing to file [97867-2]: docketing statement due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; certificate of counsel due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; statement of issues due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; lower court decision due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; any procedural

	motions due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; transcript status notice due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; deferred appendix notice due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; appearance form due 2/23/95 for Frank W. Hunger in 94-5405, for Walter A. Smith in 95-5006; any dispositive motions due 3/10/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006. [94-5405, 95-5006] (lvs)
Feb. 14	Motion filed (5 copies) by Appellants Federico F. Pena, et al. in 94-5405, (certificate of service 2/14/95) to dismiss case voluntarily [106325-1]. (lvs)
Feb. 27	CLERK'S ORDER filed granting the motion to dismiss case voluntarily filed by Federico F. Pena, Thomas Matteson, Albert J. Herberger [106325-1] The Clerk is directed to issue the mandate. (lvs)
Feb. 27	MANDATE ISSUED to Clerk, District Court [106358-1]. (lvs)

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA

C.A. No. 95-5006

JAMES GRIFFIN LANE

v.

FEDERICO PENA, SECRETARY OF TRANSPORTATION, ET AL.

RELEVANT DOCKET ENTRIES

DATE	PROCEEDINGS
1995	
Jan. 24	CIVIL-US CASE docketed. Notice of Appeal filed by Appellant James Griffin Lane. [97858-1] (lvs)
Jan. 24	CLERK'S ORDER filed to consolidate cases on cross-appeals [97867-1]. Directing to file [97867-2]: docketing statement due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; certificate of counsel due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; statement of issues due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; lower court decision due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; any procedural motions due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; transcript status notice due 2/23/95 for Federico F. Pena in 94-5405, for James

Griffin Lane in 95-5006; deferred appendix notice due 2/23/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006; appearance form due 2/23/95 for Frank W. Hunger in 94-5405, for Walter A. Smith in 95-5006; any dispositive motions due 3/10/95 for Federico F. Pena in 94-5405, for James Griffin Lane in 95-5006. [94-5405, 95-5006] (lvs)

Mar. 6 — MOTION filed (5 copies) by Appellant James Griffin Lane (certificate of service dated 3/6/95) for initial hearing in banc [109416-1], or alternatively for summary affirmance [109416-2]. Response due on 3/16/95. (jth)

Mar. 9 — MOTION filed (5 copies) by Appellees Federico F. Pena, et al., (certificate of service dated 3/9/95) for summary affirmance [109417-1]. Response due on 3/20/95. (jth)

June 2 — PER CURIAM ORDER, In Banc, filed denying motion hearing in banc [109416-1] filed by James Griffin Lane. Before Judges Edwards, Wald, Silberman, Buckley, Willliams, Ginsburg, Sentelle, Henderson, Randolph, Rogers, Tatel. Circuit Judge Tatel did not participate in this matter. (lvs)

June 5 — PER CURIAM ORDER filed granting the motion for summary affirmance filed by Federico F. Pena, Thomas Matteson, Albert J. Herberger [109417-1]. The Clerk is directed to withhold issuance of the mandate pending disposition of any timely petition for rehearing. Before Judges Silberman, Sentelle, Henderson. (lvs)

Aug. 3 — MANDATE ISSUED to Clerk, District Court [139923-1]. (edb)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE,	)	
Plaintiff,	)	
v.	)	Civil Action
FEDERICO PENA, et al.	)	No. 94-CV-1608 (CRR)
Defendants.	)	
	)	

ORDER

On July 28, 1994, counsel for the parties in the above-captioned case appeared before the Court for a status call pursuant to Rule 16 of the Federal Rules of Civil Procedure. At that time, counsel for both parties indicated that they would have no objection to combining a hearing on the Plaintiff's Motion for a Preliminary Injunction with a final determination of the merits in this case pursuant to Rule 65 of the Federal Rules of Civil Procedure. Counsel then informed the Court that there would be no disputes as to material facts and therefore suggested that this matter could be resolved upon the filing of cross-motions for summary judgment. Counsel then proposed a schedule which the Court adopted for the resolution of this case.

Accordingly, it is, by the Court, this 29th day of July, 1994,

ORDERED that pursuant to Rule 65, and with the consent of the parties, the Court shall consolidate a hearing on the Plaintiff's Motion for a Preliminary Injunction with a final determination on the merits of this case; and it is

FURTHER ORDERED that counsel shall be, and hereby are, directed to submit a joint statement of undisputed material facts in this case on or before 4:00 p.m. on August 19, 1994; and it is

FURTHER ORDERED that the parties shall file cross-motions for summary judgment on or before 4:00 p.m. on August 19, 1994; and it is

FURTHER ORDERED that oppositions thereto shall be filed on or before 4:00 p.m. on September 2, 1994; and it is

FURTHER ORDERED that counsel may file replies, if any, on or before 4:00 p.m. on September 16, 1994.

/s/ Charles R. Richey
CHARLES R. RICHEY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE,	)	
Plaintiff,	)	
v.	)	Civil Action
FEDERICO PENA, et al.	)	No. 94-CV-1608 (CRR)
Defendants.	)	
	)	

STIPULATED STATEMENT OF UNDISPUTED MATERIAL FACTS

The following facts are undisputed by the parties to the case. Owing to their differing legal theories, the parties disagree as to which of the facts are material, but they agree that none of the facts herein -- and therefore none of the facts herein that this Court ultimately finds material -- are disputed.

1. Plaintiff applied for an appointment to the U.S. Merchant Marine Academy ("USMMA" or the "Academy") in 1990. As a condition of his appointment, plaintiff was required to undergo a physical examination to determine if he met the physical qualifications for appointment to the USMMA.

2. Plaintiff's physical examination was administered by the Department of Defense Medical Examination Review Board ("DoDMERB") on November 29, 1990.

3. On November 27, 1990, plaintiff submitted a medical history form to DoDMERB. It asked, inter alia, whether plaintiff ever had, or at that time had, "blood, protein, or sugar in urine." Plaintiff responded "no."

4. During plaintiff's November 1990 examination by DoDMERB, a urinalysis test was administered and the results were "negative" for sugar in the urine.

5. On June 4, 1991, DoDMERB stamped on plaintiff's medical evaluation form that he was "medically qualified" and "recommended for service academies and ROTC programs."

6. Plaintiff entered the Academy in July 1991.

7. On February 1, 1991, plaintiff consulted a private family physician. He reported excessive thirst and hunger. A test ordered by the physician showed plaintiff had an elevated blood sugar level on February 1. The physician directed plaintiff to limit his intake of calories and to take an oral hypoglycemic medication to reduce his blood sugar level. Over a period of seven weeks, the physician directed plaintiff to gradually phase out his medication and the limits on his diet. Over this period, plaintiff's blood sugar test results fluctuated between the normal range and the higher than normal range. On March 21, 1991, the day of plaintiff's last visit to the physician, his blood sugar was within the normal range.

8. In September or October of 1991, plaintiff had the flu, complained of excessive thirst and hunger, and began to lose weight.

9. On November 29, 1991, plaintiff consulted a private physician, who took blood and urine samples. Tests on the samples, including a "glycohemoglobin" test, indicated high blood sugar. The physician noted she "suspect[ed]" diabetes mellitus and prescribed oral hypoglycemic medication.

10. In December 1991, plaintiff consulted Dr. Didace Kabatsi, a private endocrinologist, who took blood and urine samples. Based on the results of tests performed on the samples between December 23, 1991 and January 15, 1992, including "glycohemoglobin" and "anti-islet cell antibodies" tests, Dr. Kabatsi diagnosed plaintiff as having diabetes mellitus.

11. On February 11, 1992, plaintiff visited Dr. Daniel Kalash, Chief Medical Officer at the Academy. Dr. Kalash recorded in his notes under "Subjective" that plaintiff advised him that plaintiff had what Dr. Kalash characterized as an "intermittent history during [the] past several months of

glycosuria [sugar in the urine] & [elevated] blood sugar." Dr. Kalash also recorded in the same section of his notes that plaintiff advised him that plaintiff had been "[t]reated by private physician [and] oral hypoglycemics." Dr. Kalash further recorded in the same section of his notes that plaintiff advised him that plaintiff's "blood sugar [levels had returned to] normal" and that medications ("meds.") had been "stopped." Dr. Kalash further recorded in the same section of his notes: "endocrinologist - glycohemoglobin & anti-islet cell test elevated." Dr. Kalash further recorded in the same section of his notes that plaintiff reported he was monitoring his "blood sugar in [his] barracks" and that "all findings [were] normal."

12. On February 11, 1992, Dr. Kalash recorded in his notes regarding his visit with plaintiff: "Assess: Early Diabetes type I."

13. On February 11, 1992, Dr. Kalash recorded in his notes regarding his visit with plaintiff: "Capt. Bauer notified & communicated problem to BuMed." At that time, Bauer was the Head of the Department of Naval Science at the Academy.

14. On February 11, 1992, Dr. Kalash instructed plaintiff to "continue observation [of his] blood sugars" and "to report abnormalities & any symptoms." Dr. Kalash indicated that he would repeat the lab workup on plaintiff at the end of his third class (sophomore) year.

15. Plaintiff's medical records at the Academy contain a page entitled "Problem List," which ordinarily is placed on the top of an individual's medical file (at the bottom of the page it reads: "Place sheet top left side one"). The page provides space for ten numbered entries, and has columns labeled "Problem," "Onset," and "Resolved." The only entry for plaintiff is handwritten and reads: (under "Problem") "Diabetes Mellitus?" and (under "Onset") "1991."

16. In March 1992, plaintiff consulted Dr. Jay Skyler, an endocrinologist at the University of Miami, and President of

the American Diabetes Association. Dr. Skyler confirmed plaintiff had diabetes, recommended insulin therapy, and referred plaintiff to Dr. S. Mark Tanen, an endocrinologist in Northern Virginia.

17. Plaintiff achieved a 3.4 grade point average during his first year at the Academy, rowed crew, and consistently scored in the "outstanding" range on the physical readiness exams administered to students at the Academy.

18. While at the Academy, plaintiff participated in various sea-going activities. These included several instances where plaintiff spent the day working aboard a ship. Plaintiff also volunteered and was accepted for a 4-5 day journey up the East Coast in a tugboat, during which storm conditions caused the tugboat to undergo 40-degree rolls. Plaintiff's medical records contain no indication that plaintiff had any medical problems associated with these sea-going activities.

19. In early July 1992, shortly before commencing his second year at the Academy, plaintiff began seeing Dr. Tanen. Dr. Tanen recommended insulin therapy. Plaintiff began taking insulin in July 1992 to help control his diabetes.

20. In a letter dated July 23, 1992, plaintiff's father, J.W. Lane, Jr., notified the Superintendent of the Academy that plaintiff had begun taking insulin in order to control his diabetes.

21. Following Mr. Lane's July 23, 1992 letter, plaintiff first heard from the Academy regarding his diabetes when he was informed that a Physical Examination Review Board ("PERB") hearing had been scheduled to discuss his medical condition.

22. Plaintiff was informed of the PERB hearing on September 4, 1992 (the Friday of Labor Day weekend); the hearing was set for Tuesday, September 8.

23. Plaintiff's PERB hearing was convened on September 8, 1992, as scheduled. According to a report to the Superintendent regarding the hearing prepared by Cap-

tain James D. Ormiston, USMS, the PERB consisted of Ormiston, "Captain William McMullen and Lieutenant Commander David Mund." The Board, "exclusive of LCDR Mund, met with [midshipman] Lane on September 8." At the hearing, "[a]lso participating as non-voting members of the Board were Commander Russell Bauer, US [Navy], Head, [USMMA] Department of Naval Science and Commander William E. Evans, US [Coast Guard]." Plaintiff was unaccompanied at the hearing.

24. The purpose of the PERB hearing was to determine plaintiff's "medical suitability for continuance" at the Academy. This purpose was to be accomplished by confirming that plaintiff had insulin-dependent diabetes mellitus, as indicated in the July 23, 1992 letter from plaintiff's father. The PERB, in evaluating plaintiff's "medical suitability," did not evaluate the particular circumstances of plaintiff's case other than to verify his status as a diabetic.

25. On September 16, 1992, the PERB advised the Superintendent that plaintiff had insulin-dependent diabetes. The PERB advised the Superintendent that under U.S. Navy commissioning standards, insulin-dependent diabetes was "a disqualifying condition for military service" and, accordingly, that plaintiff "would not be commissionable in the Navy/Merchant Marine Reserve Program."

26. On September 16, 1992, the PERB also advised the Superintendent that plaintiff's diabetes might not render him ineligible for a Coast Guard merchant marine license. The PERB advised the Superintendent that Coast Guard licensing "requirements do not seem to be as rigid as the Navy requirements but a waiver is required when an applicant is insulin-dependent and may not be automatic, it would depend on the specifics of the condition."

27. On September 21, 1992, the Superintendent advised plaintiff that he would be separated from the Academy effective December 18, 1992. The Superintendent stated: "Adult-onset (Type I) diabetes is a disqualifying condition for military service. You are not eligible for appointment as

Midshipman, MMR/USNR nor for commissioning as a Naval Reserve Officer." The Superintendent also advised plaintiff that he would be permitted to continue to take classes at the Academy through December 18, 1992, and thus complete the first half of his sophomore year (i.e., the classroom portion, but not the shipboard training portion) and "have an opportunity . . . to arrange for admission to another college to complete your education."

28. In early October 1992, plaintiff's father wrote to Captain Warren G. LeBack, then-Administrator of the U.S. Maritime Administration ("MARAD"), challenging the Superintendent's decision.

29. In November 1992, plaintiff achieved an "outstanding" rating on the physical readiness exam administered by the Academy.

30. In December 1992, Dr. Tanen, the diabetes specialist who had been treating plaintiff regularly since July 1992, concluded that, in his opinion, plaintiff's diabetes was under "extremely good control." Dr. Tanen noted that plaintiff had not experienced any incapacitating episodes due to his condition.

31. Exhibit 11 to Plaintiff's Motion for Preliminary Injunction is a true and accurate copy of a letter dated January 15, 1993, from MARAD Administrator LeBack to plaintiff responding to plaintiff's request for review of the September 21, 1992 decision of the Superintendent to separate plaintiff from the Academy.

32. Between January 15, 1993 and April 15, 1994, plaintiff took steps to obtain the assurances specified in the January 15, 1993 letter.

33. On April 15, 1994, MARAD Administrator A.J. Herberger issued a letter to plaintiff stating, inter alia, that plaintiff could not meet physical qualifications standards applicable to midshipmen at the USMMA because "insulin dependent diabetes disqualifies an individual from receiving a commission in any component of the reserves of the armed forces of the United States."

34. Plaintiff never has refused to apply for such a commission, would apply for one at the appropriate time, and would accept one if offered.

35. The Department of the Navy consistently has applied the same physical qualifications standards with respect to diabetes mellitus. Diabetes mellitus -- whether insulin-dependent or otherwise -- is a disqualifying condition for commissioning in all active duty and reserve units of all of the armed forces.

36. The United States Coast Guard grants merchant marine licenses -- including licenses permitting their holders to serve as deck officers at sea -- to persons with diabetes mellitus, which may include some individuals with insulin-dependent diabetes, and some individuals with non-insulin-dependent diabetes. An individual with diabetes applying for a Coast Guard merchant marine license must obtain a waiver of Coast Guard physical qualifications standards with respect to diabetes. Such waivers may be obtained for individuals, including merchant marine officers, who are able to show to the satisfaction of the Coast Guard that their diabetes is under control and that they are otherwise physically qualified for a merchant marine license.

37. In recent years, students have attended and graduated from the Academy despite having developed physical disabilities -- including loss of a limb, loss of an eye, brain damage and color blindness -- while they were students.

38. Students with insulin-dependent diabetes have enrolled in and recently graduated from at least one state maritime academy, the Maine Maritime Academy.

39. As of December 1993, more than 50 persons with diabetes currently are sailing on an active merchant marine license. At least some of these individuals are insulin-dependent.

Respectfully submitted,

/s/ Daniel B. Kohrman
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Counsel for Defendants
Federico Pena, et al.

Dated: August 19, 1994

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Argued October 12, 1994 Decided December 16, 1994

No. 93-5080

JAMES DORSEY,

APPELLANT

v.

UNITED STATES DEPARTMENT OF LABOR, ET AL.,

APPELLEES

Appeal from the United States District Court
for the District of Columbia
(88cv01898)

Ross Lipman argued the cause for appellant. With him on the briefs were *Mark H. Duesenberg* and *Ella L. Roberts*.

Deborah Ruth Kant, Attorney, Department of Justice, argued the cause for appellees. With her on the brief were *Frank W. Hunger*, Assistant Attorney General, *Eric H. Holder, Jr.*, United States Attorney, and *Barbara C. Biddle*, Attorney, Department of Justice.

Before: EDWARDS, *Chief Judge*, SILBERMAN and RANDOLPH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* RANDOLPH.

RANDOLPH, *Circuit Judge*: The issue in this appeal from the judgment of the district court, dismissing James Dorsey's suit against the Department of Labor, its Secretary, the Office

of Job Corps, and its Director, is whether there is a private right of action for monetary damages against the federal government for violating § 504 of the Rehabilitation Act of 1973, as amended in 1978, 29 U.S.C. § 794. The Ninth Circuit, in *Doe v. Attorney General*, 941 F.2d 780 (9th Cir. 1990), decided this issue against the government. We reach the opposite conclusion on the ground that the government has not waived its sovereign immunity from such suits.

Dorsey alleged that he was handicapped and that, in violation of § 504, the defendants had unlawfully discriminated against him on the basis of his handicap during his participation in the Job Corps. Administered by the Department of Labor, the Job Corps provides training and education for individuals between the ages of 14 and 22 who are "economically disadvantaged" and who were living in "an environment so characterized by cultural deprivation, a disruptive homelife, or other disorienting conditions as to substantially impair prospects for successful participation in other programs providing needed training, education or assistance." 29 U.S.C. § 1693(2) & (3). According to Dorsey, the "vast majority of the Job Corps facilities around the country are residential. In these facilities, Job Corps participants live in a dormitory environment and are under the 24-hour supervision of Job Corps personnel."

Dorsey joined the Job Corps at the residential center in Dayton, Ohio, in August 1987. After enrolling, he submitted to a mandatory medical examination in which he tested positive for HIV antibodies. For this reason and pursuant to its policy at the time, the Job Corps expelled Dorsey from the program in September 1987 and a year later Dorsey brought this suit challenging the Job Corps' action.

In January 1989, while the suit was pending, the Job Corps notified Dorsey that it had revised its policy by making the exclusion of HIV-positive applicants discretionary rather than mandatory and that Dorsey could re-apply to one of its residential centers. On the recommendation of a Job Corps representative, Dorsey applied to the residential facility in Morganfield, Kentucky, and travelled there in May 1989.

Once again Dorsey tested HIV-positive. The Job Corps nevertheless permitted him to join the Kentucky facility, where he enrolled in culinary arts courses. In his amended complaint, Dorsey alleges that after his HIV test results became widely known at the facility, Job Corps staff members and enrollees ridiculed and harassed him. Dorsey requested and received a transfer to the Dayton, Ohio, facility where he had first enrolled. According to Dorsey, a teacher at the Dayton facility disclosed his HIV-positive status and fellow students thereafter harassed him.

In a ruling Dorsey does not contest, the district court dismissed his complaint as moot insofar as it sought declaratory and injunctive relief. As to Dorsey's claim for damages for emotional distress, the district court, relying partly on *Doe v. District of Columbia*, 796 F. Supp. 559 (D.D.C. 1992), ruled that the Rehabilitation Act permitted recovery from the federal government. On the federal defendants' motion, the court reconsidered its ruling and held that § 504 of the Act had not waived the government's immunity from damages. Dorsey appeals from the court's judgment dismissing the compensatory damages portion of his complaint.

The Rehabilitation Act of 1973 deals with discrimination against individuals on the basis of their "handicaps," as the original version of the Act put it, or their "disabilities," as a 1992 amendment to the Act rephrased it. Rehabilitation Act of 1973, Pub. L. No. 93-112, 87 Stat. 394, *amended by* the Rehabilitation Act Amendments of 1992, Pub. L. No. 102-569, § 102(p)(32), 106 Stat. 4360 (codified at 29 U.S.C. § 794(a) (Supp. IV 1992)). Section 504, as amended in 1978, bars private federal aid recipients and "Executive agenc[ies]" from discriminating on the basis of a person's handicap and requires the agencies to promulgate regulations needed to carry out the provision. Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, § 119, 92 Stat. 2982. When this action commenced in July 1988, § 504 read in relevant part:

> No otherwise qualified individual with handicaps ... shall, solely by reason of his handicap, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance *or under any program or activity conducted by any Executive agency* . . . .

29 U.S.C. § 794(a) (1988). (The italicized words were added in a 1978 amendment to the Act.)

The district court ruled that Dorsey's HIV-positive status rendered him handicapped within the Act's meaning and we shall assume, *arguendo,* this to be so. *See Harris v. Thigpen,* 941 F.2d 1495, 1524 (11th Cir. 1991); *Severino v. North Fort Myers Fire Control Dist.,* 935 F.2d 1179, 1182-83 n.4 (11th Cir. 1991); *Leckelt v. Board of Comm'rs of Hosp. Dist. No. 1,* 909 F.2d 820, 825 (5th Cir. 1990). We shall also assume that Dorsey is "an otherwise qualified individual" under § 504 and that the actions he complains about constitute forbidden "discrimination" for which the Job Corps is responsible.

Whether Dorsey may recover damages from the federal government for the discrimination is another matter. The pertinent remedy provision of the Act, § 505(a)(2), states:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

29 U.S.C. § 794a(a)(2). Title VI of the Civil Rights Act prohibits federal grantees or aid recipients from discriminating on the basis of race. 42 U.S.C. § 2000d. Given § 505(a)(2), Dorsey must establish not only the general proposition that claimants may recover monetary relief in private Title VI actions, but also the more specific point that they may do so against Executive agencies despite sovereign immunity.

Dorsey's difficulties begin with the fact that Title VI does not explicitly provide a private right of action for compensatory damages. It preserves whatever general right to judicial review other laws provide or, if none is provided, it allows persons aggrieved to seek judicial review of government funding and grant decisions pursuant to the Administrative Procedure Act. 42 U.S.C. § 2000d-2. If a private right of action for damages under Title VI is to exist, therefore, it must be judicially inferred, or as is commonly stated, implied. On that score the decisional law is not entirely settled. The Supreme Court, in *Consolidated Railroad Corp. v. Darrone,* 465 U.S. 624 (1984), suggested that the issue was open: "[w]ithout determining the extent to which money damages are available under § 504, we think it clear that § 504 authorizes a plaintiff who alleges intentional discrimination to bring an equitable action for backpay." 465 U.S. at 630. *See also* the separate opinions in *Guardians Ass'n v. Civil Service Commission,* 463 U.S. 582 (1983). Since then the Court has treated the question whether a private cause of action should be inferred as an issue of statutory construction and has cautioned that, if a statute provides one sort of remedy, "courts must be especially reluctant to provide additional remedies." *Karahalios v. National Fed'n of Fed. Employees, Local 1263,* 489 U.S. 527, 533 (1989). On the other side of the scale is not only the Ninth Circuit opinion already mentioned, sustaining such an implied right of action (*Doe v. Attorney General,* 941 F.2d at 787), but also the earlier Supreme Court decision in *Cannon v. University of Chicago,* 441 U.S. 677 (1979), which held that Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, is enforceable through an implied right of action because Title IX was derived from Title VI, Congress understood private remedies to be available under Title VI, and Congress therefore intended similar remedies to be available under Title IX. *Cannon,* 441 U.S. at 694-703. Citing *Cannon,* we stated that "private suits provide an appropriate and effective mechanism for judicial consideration of compliance with Title VI." *Adams v. Bell,* 711 F.2d 161, 168 n.35 (D.C. Cir. 1983) (in banc), *cert. denied,* 465 U.S. 1021 (1984). While our discussion in *Adams,* like the Supreme Court's decision in *Consolidated Railroad Corp. v. Darrone,* concerned only equitable relief, this may not be determinative in view of

Franklin v. Gwinnett County Public Schools, 112 S Ct. 1028 (1992). *Franklin* held that once the federal courts have inferred a private cause of action from a statute that did not expressly provide one, the "courts have the power to award any appropriate relief," including not only equitable relief but also monetary damages, unless it appears that Congress intended otherwise. 112 S. Ct. at 1035.

We see no need, however, to resolve the issue. Even if there is an implied right of action for damages under Title VI, and thus under § 504, it cannot exist as against the federal government. The federal government's waiver of sovereign immunity must be "unequivocally expressed" and the statutory provision containing the expression must "establish unambiguously that the waiver extends to monetary claims." *United States v. Nordic Village, Inc.* 112 S. Ct. 1011, 1014, 1015 (1992). Because a § 504 private right of action for damages -- against anyone -- must be judicially implied from a statute silent on the subject, Dorsey is unable to point to any explicit language in the Rehabilitation Act (or in Title VI) waiving the government's sovereign immunity. He therefore cannot prevail. While private rights of action may be implied, waivers of sovereign immunity may not. The Supreme Court has said exactly that, and on more than one occasion: "A waiver of sovereign immunity 'cannot be implied. . . .' " *Irwin v. Department of Veterans Affairs,* 498 U.S. 89, 95 (1990), quoting *United States v. Mitchell,* 445 U.S. 535, 538 (1980), which quoted *United States v. King,* 395 U.S. 1, 4 (1969).

Dorsey argues that "[b]ecause monetary damages are available against private parties under title VI and section 505(a)(2), . . . they are equally available against the federal government. . . . Congress intended that *all* remedies available under title VI also be available to aggrieved persons seeking redress under section 505(a)(2)." Brief of Appellant at 11-12. The Ninth Circuit in *Doe v. Attorney General,* 941 F.2d at 790, 792, took much the same position. That damages may be recovered against private parties does not, however, lead to the conclusion that damages may also be

recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing than private parties. To contend, as Dorsey does, that Congress "intended" to make all remedies available for § 504 violations is simply another way of arguing, quite incorrectly, that a court may find a waiver of the government's sovereign immunity despite the absence of any unequivocal statutory expression to that effect. The Ninth Circuit recognized the statutory void and tried to fill it with some legislative history from the 1978 amendment to § 504 bringing Executive agencies within its coverage. But the court found nothing in the committee reports and the five statements it quoted from the floor debates are -- at the very best -- ambiguous. 941 F.2d at 791-92. The three representatives and two senators, rather than expressing themselves clearly on the subject, uttered not a word about relinquishing the government's immunity from damages. In any event, we believe the Ninth Circuit would have decided the case differently if it had had the benefit of the Supreme Court's later decision in *Nordic Village.* The Court there held "the 'unequivocal expression' of elimination of sovereign immunity that we insist upon is an expression in statutory text. If clarity does not exist there" -- and it does not in Dorsey's case -- "it cannot be supplied" by legislative history. 112 S. Ct. at 1016.

Affirmed.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JAMES GRIFFIN LANE,	)	
Plaintiff,	)	
v.	)	Civil Action
FEDERICO PENA et al.,	)	No. 94-1608
Defendants.	)	
	)	

DEFENDANTS' NOTICE OF APPEAL

Notice is hereby given that defendants Federico Pena, Secretary of Transportation; Thomas Matteson, Superintendent of the United States Merchant Marine Academy ("USMMA"); and A.J. Herberger, Administrator of the Maritime Administration, hereby appeal, pursuant to 28 U.S.C. § 1292(a)(1), to the United States Court of Appeals for the District of Columbia Circuit, from the Order entered October 26, 1994, denying defendants' motion for summary judgment, granting plaintiff's motion for summary judgment, entering judgment in favor of plaintiff on the issue of liability, and directing defendants to reinstate plaintiff at the USMMA and "take all steps necessary to ensure that Plaintiff Lane

resumes his maritime training at the Academy as soon as practicable."

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES GRIFFIN LANE,	)	
Appellee,	)	
v.	)	
FEDERICO F. PENA, et al.,	)	No. 94-5405
Appellants.	)	
	)	

ORDER

Upon consideration of Appellant's motion to dismiss appeal pursuant to Federal Rule of Appellate Procedure 42(b), it is

ORDERED that the aforesaid motion is granted and the above captioned appeal is hereby dismissed.

The Clerk is directed to transmit to the Clerk of the District Court a certified copy of this order in lieu of a formal mandate.

FOR THE COURT:

BY: /s/ Elizabeth V. Scott
Elizabeth V. Scott, Deputy Clerk

Order 93-11 (April 1992)

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

JAMES GRIFFIN LANE,	)	
Plaintiff-Appellant,	)	
v.	)	
FEDERICO PENA, et al.,	)	No. 95-5006
Defendants-Appellees.)		
	)	

MOTION FOR SUMMARY AFFIRMANCE

Pursuant to the Court's local rule 27(g), the defendants, the Secretary of Transportation, et al., hereby move this Court to summarily affirm the district court's judgment in the above-referenced appeal. The reasons for this motion are as follows:

1. The parties agree that the only issue in this appeal is whether plaintiff may recover money damages under section 504 of the Rehabilitation Act for alleged disability discrimination in federal program. 29 U.S.C. 794(a). The district court held that this Court's decision issued on December 16, 1994, Dorsey v. United States Department of Labor, No. 93-5080 (D.C. Cir.), holding that there is no waiver of sovereign immunity for damages under the Rehabilitation Act, 29 U.S.C. 794(a), controls this case and precludes an award of damages. See Attached District Court Order dated December 22, 1994. Plaintiff in his stipulation before the district court and in his motion for an extension of time to file for initial hearing *en banc* or in the alternative summary affirmance does not dispute that the Dorsey opinion governs this case and bars the award for damages. For these reasons, summary affirmance is warranted.

2. Moreover, initial hearing *en banc* is not appropriate in this case. As the Court in Dorsey ruled, the issue of the availability of damages under the Rehabilitation Act for alleged

disability discrimination in government programs involves a straightforward application of principles of sovereign immunity as recently re-articulated by the Supreme Court in United States v. Nordic Village, 112 S.Ct. 1011, 1014-15 (1992). Since Nordic holds that there must be an unequivocally expressed waiver in the text of the statute itself and that it cannot be supplied by legislative history, Dorsey's holding that the text of sections 504 and 505 of the Rehabilitation Act contains no such waiver is unassailable.

CONCLUSION

For the foregoing reasons, the motion for summary affirmance should be granted.

Respectfully submitted,

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No. 95-365

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF FOR PETITIONER

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50 pp

QUESTION PRESENTED

Whether Congress intended to exempt the federal government—and only the federal government—from paying damages for harm caused by its violations of Section 504 of the Rehabilitation Act.

PARTIES TO THE PROCEEDINGS

James Griffin Lane was the plaintiff in the district court and the appellant in the court of appeals on the issue of damages. The defendants in the district court, and the appellees in the court of appeals on the issue of damages were: Federico F. Peña, the Secretary of Transportation; Thomas Matteson, the Superintendent of the United States Merchant Marine Academy; and A.J. Herberger, the Administrator of the Maritime Administration.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-365

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR PETITIONER

OPINIONS BELOW

The June 2, 1995 and June 5, 1995 orders of the court of appeals are unreported and are reprinted in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-4a. The December 22, 1994 order of the district court is unreported and is reprinted in the Appendix to the Petition at 5a-10a. The October 26, 1994 memorandum opinion and order of the district court is reported at 867 F. Supp 1050 and is reprinted in the Appendix to the Petition at 11a-63a. The Petition was granted on January 5, 1996.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 504(a) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794(a), provides [in pertinent part]:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service.

Section 505(a)(2) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(a)(2), provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title [Section 504 of the Act].

Section 505(b) of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794a(b), provides:

> In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

Section 1003 of the Rehabilitation Act Amendments of 1986, 42 U.S.C. § 2000d-7, provides:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
>
> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

STATEMENT OF THE CASE

A. Statement of Facts

The question before the Court is whether Congress intended federal agencies to be liable for damages caused by their violations of Section 504 of the Rehabilitation Act. The facts material to this question are undisputed and were stipulated to by the parties. *See* Pet. App. 8a-10a; Joint Appendix ("J.A.") 13-20.

In 1990, petitioner James Griffin Lane applied for an appointment to the United States Merchant Marine Academy ("the Academy" or "the USMMA"), a federal institution of post-secondary education in Kings Point, New York that trains students to serve in the merchant marine of the United States. In early 1991, Lane received a congressional nomination and thereafter received notice of his appointment to the Academy.[1] He

[1] *See* Mem. in Supp. of Pl.['s] Mot. for Prelim. Inj., *Lane* v. *Peña*, Civ. No. 94-1608 (D.D.C. July 22, 1994), Attachments 2

entered the USMMA in July 1991, after receiving medical clearance from the Department of Defense Medical Examination Review Board. Pet. App. 15a-16a.

During his first year at the Academy, Lane was diagnosed as having diabetes mellitus and reported this fact to the Academy's Chief Medical Officer. *Id.* at 15a-16a. Prior to his second year at the Academy, Lane began insulin therapy. His father informed the Academy of this development in late July 1992. *Id.* at 17a.

Notwithstanding his diabetes, Lane compiled a fine record as a USMMA cadet. In his first year, he "achieved a 3.4 grade point average * * *, rowed crew, and participated in various sea-going activities." *Id.* at 18a. He had no medical problems associated with these endeavors, and those "most familiar with [his] abilities and control over his diabetes" confirmed that "he could complete his education and training at the Academy with little or no difficulty." *Id.* at 18a, 53a.

Nevertheless, in early September 1992, the Academy held a hearing to determine Lane's "medical suitability" for continuing at the USMMA. Academy officials verified that Lane was a diabetic; however, they "did not evaluate the particular circumstances of [his] case." *Id.* at 17a. Instead, the Academy's Superintendent simply advised Lane that diabetes was a "disqualifying condition." He was separated from the USMMA in December, half-way through his second year of school. *Id.* at 18a.

Lane challenged his separation before the Maritime Administration ("MARAD") Administrator. After considerable delay, the Administrator rejected this

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(Letter from Frank R. Wolf, Member of Congress (R., VA), to James Griffin Lane, January 25, 1991) (confirming nomination), and 3 (Letter from Frank R. Wolf, Member of Congress, April 5, 1991) (notice of appointment).

challenge, stating that Lane's diabetes "disqualifie[d]" him from the USMMA. *Id.* at 19a.

Lane then filed suit in the federal district court, alleging that his exclusion from the Academy violated Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. § 794(a) ("Section 504" or "the Act"), which forbids discrimination on the basis of disability against "otherwise qualified individual[s]" in connection with "any program or activity conducted by any Executive agency." In addition to injunctive relief, Lane sought compensatory damages, "including out-of-pocket costs, loss of professional opportunity, and pain and suffering." Pet. App. 12a.

B. The Decisions of the District Court

On October 26, 1994, the district court granted summary judgment in Lane's favor, noting: "[i]t is undisputed that Section 504 is violated if: (1) the claimant has a disability; (2) he or she was denied participation in a federal program because of the disability; and (3) he or she was otherwise 'qualified' for the program." Pet. App. 50a. The court determined that the only issue in the case was whether Lane was "otherwise qualified to remain at the USMMA," and held that "the Defendants violated Section 504 of the Rehabilitation Act by disenrolling Lane solely on the basis of his diabetes and without making any attempt to reasonably accommodate his disability." *Id.* at 14a.

In support of this holding, the district court observed that "[t]he Stipulated Facts reveal that James Griffin Lane has repeatedly achieved an 'outstanding' rating on the physical readiness exam administered by the Academy * * * , that his physician has reported that his diabetes mellitus is under 'extremely good control,' and that the Academy has allowed students in the past with a lost limb, a lost eye, brain damage, and color blindness to remain at the Academy and graduate despite their disabilities." Pet. App. 14a. Moreover, "at least 50"

individuals with diabetes "are currently operating under a merchant marine license at sea." *Id.* at 38a; *see* J.A. 19. The court also stated: "[i]t is undisputed that, if Lane continues to control his diabetic condition, he will make a fine merchant marine officer"; and, finally, that upon "allowing Lane to graduate and become a merchant marine officer * * * the government will likely benefit greatly from his service." Pet. App. 53a, 54a.

To remedy this violation of Section 504, the district court first ordered Lane reinstated to the Academy. *Id.* at 57a.[2] Respondents did not dispute the propriety of this injunctive relief; neither did they dispute the permissibility of an attorneys' fee award against the United States due to its Section 504 violation.[3] Instead, as the court noted, the only dispute was "over whether [Lane] may recover compensatory damages against the government under Section 504." *Id.* at 57a. And significantly, as the court noted, respondents "do not contest" that monetary damages *are* available for violations of Section 504 by private parties and by other public entities. Rather, they argue only "that the doctrine of sovereign immunity protects *them* from a damage suit" under that Section. *Id.* at 58a (emphasis added).

The district court rejected respondents' argument for essentially three reasons: first, the 1978 Amendments to Section 504 expressly extended its discrimination prohibition to federal agencies; second, at the time of those amendments Congress knew the courts had found a

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[2] Lane returned to the Academy in January 1995. By the summer of 1995, he had successfully completed six months sea training. He completed another semester of classroom work in the fall of 1995, and recently began a second six-month tour of sea training, which will end during the summer of 1996. In July 1996 he is scheduled to start his final year at the Academy.

[3] The district court specifically noted (Pet. App. 57a n.11) that under the Act "a prevailing party" may be allowed "a reasonable attorney fee as part of the costs." *See* Section 505(b) of the Act, 29 U.S.C. § 794a(b).

private right of action available for victims of Section 504 discrimination; and third, both the language and history of the Act make clear Congress' intent "'that there be no distinction in the [the statute's] enforcement against federal defendants,'" *i.e.*, that the damages unquestionably available against non-federal defendants should also be available against federal defendants. *Id.* at 59a-60a (quoting *Doe* v. *Attorney General*, 941 F.2d 780, 790 (9th Cir. 1991) and citing *J.L. & K.P.* v. *Social Security Admin.*, 971 F.2d 260, 264 (9th Cir. 1992) (reaffirming *Doe*)).

C. The *Dorsey* Decision

Less than two months after the district court granted Lane summary judgment on all counts, the D.C. Circuit held in another case that there is no "private right of action for monetary damages" against federal agencies under Section 504, expressly disagreeing with the Ninth Circuit's contrary holdings in *Doe* and *J.L. Dorsey* v. *United States Dep't. of Labor*, 41 F.3d 1551, 1552 (1994). J.A. 21-27.[4]

In reaching this view, the D.C. Circuit appeared to acknowledge that Congress intended a private right of action under Section 504, as indicated by *Cannon* v. *University of Chicago*, 441 U.S. 677 (1979), and that Congress intended all appropriate relief to be available in those actions, as indicated by *Franklin* v. *Gwinett County Public Schools*, 503 U.S. 60 (1992). J.A. 25-26. Nevertheless, without addressing the effect of the 1978 Amendments expressly adding federal agencies to the prohibitions of Section 504, and without acknowledging the 1986 Amendments to the statute stating that the same "remedies both at law and in equity" are available "to the same extent" against all entities subject to the Act, the court of appeals summarily concluded that no dam-

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[4] Because the D.C. Circuit subsequently summarily rejected damages to petitioner on the basis of *Dorsey*, the *Dorsey* opinion is included in the Joint Appendix for the Court's convenience.

ages could be had against the federal government because the statute contained no "unequivocal statutory expression to that effect." J.A. 27. In reaching this conclusion as to Congress' intent—without analyzing either the language of the statute as a whole, or its purpose, policies, or history—the court relied on this Court's decision in *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). It therefore disagreed with the Ninth Circuit's decisions in *Doe* and *J.L.*

D. The Parties' Stipulation on Damages Issues

In the wake of *Dorsey*, the parties reached a joint stipulation regarding the government's potential liability to Lane for compensatory damages. Pet. App. 8a-10a. First, the parties agreed that *Dorsey* required the district court to enter an order denying Lane's claim for damages. *Id.* at 9a. Second, the parties agreed that Lane would retain the right to pursue his entitlement to damages on appeal. And third, the parties stipulated that the amount of Lane's damages caused by the government's discrimination was $75,000. *Id.* at 9a-10a. Of that amount, the parties stipulated that $50,000 represented two years' lost income attributable to Lane's delayed graduation from the Academy and his delayed post-graduation employment; $15,000 represented his out-of-pocket expenses "for tuition and other related expenses incurred * * * between the time of his separation from the Academy in December 1992 and the * * * resumption of his studies at the Academy in January 1995"; and $10,000 represented his pain and suffering. *Id.* at 9a. Notwithstanding these conceded damages, based on *Dorsey* the district court entered judgment for the government on the issue of Lane's entitlement to damages. *Id.* at 5a-7a.

E. The Court of Appeals' Decisions in *Lane*

Lane appealed the district court's December 22, 1994 judgment in favor of respondents on the issue of damages. And initially, respondents appealed the district

court's determination of liability under Section 504 and its entry of injunctive relief "directing defendants to reinstate plaintiff at the USMMA." J.A. 28. However, respondents later voluntarily dismissed that appeal, thereby rendering final the district court's determinations: (1) that the respondents were subject to suit under 504; (2) that they violated that Section; and (3) that Congress authorized the awarding of injunctive relief against them under that Section.

Regarding the sole remaining disputed issue—Congress' intent regarding the availability of damages for federal-agency violations of Section 504—Lane moved for initial *in banc* consideration in the court of appeals in order to seek reconsideration of *Dorsey*. In the alternative, Lane urged summary affirmance of the district court's adverse decision, so that review could be promptly sought in this Court. Respondents subsequently filed their own Motion for Summary Affirmance. That Motion acknowledged that the only issue remaining in this case is "whether plaintiff may recover money damages under section 504 of the Rehabilitation Act for alleged disability discrimination in federal program[s]." J.A. 31.[5]

The court of appeals denied Lane's request for initial *in banc* review, Pet. App. 3a-4a, and granted the Motion for Summary Affirmance without opinion, *id.* at 1a-2a. This Court thereafter granted Lane's petition for a writ of certiorari on the question of damages.

SUMMARY OF ARGUMENT

Sections 504 and 505 of the Rehabilitation Act, as enacted in 1973, amended in 1978 and 1986, and reen-

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[5] As noted, the discrimination in this case is not simply "alleged"; it has been judicially determined in a final, unappealed decision. In addition, that discrimination was intentional, *i.e.*, it involved specific acts of purposeful "disparate treatment" (*Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 830 n.9 (4th Cir. 1994)) "based solely on [Lane's] diabetes." Pet. App. 56a.

acted in 1992, together evidence Congress' clear intent to allow compensatory damages in private enforcement actions against any defendant, including federal agencies. Any other reading of the Act is implausible, in light of its language, its history, its purposes, its construction in the federal courts since 1973, and the presumption that unless Congress expressly provides to the contrary, it intends "all appropriate remedies" to be available, including money damages, when it creates a cause of action to vindicate federal statutory rights. *See Franklin*, 503 U.S. at 66.

The Court's sovereign immunity jurisprudence supports this reading of Congress' intent. For even in cases where sovereign immunity is implicated, this Court remains committed to giving statutes their common-sense reading using all available tools of statutory construction. Here those tools and that common-sense reading demonstrate quite clearly that Congress intended all defendants, including federal agencies, to be subject to the same remedies under the Act, and that those remedies include both equitable relief and monetary damages. Not one word in the statute suggests any differential remedial treatment among defendants, much less that only federal defendants are to receive special treatment and only for purposes of a damages exemption. Nothing in sovereign immunity law warrants any such implausible interpretation of this statute. It therefore should not be accepted by this Court when all other indicia of congressional intent are clearly to the contrary.

ARGUMENT

I. IN DETERMINING WHETHER CONGRESS INTENDED TO PERMIT MONEY DAMAGES IN THIS CASE, THE COURT SHOULD TAKE INTO ACCOUNT ALL RELEVANT INDICIA OF CONGRESSIONAL INTENT

The question in this case is whether Congress intended that Griff Lane be compensated through an award of money damages for the federal government's undisputed

violation of the Rehabilitation Act. This case thus necessarily involves the principle of sovereign immunity; that principle in turn raises the presumption that Congress did not intend to permit the award of such damages unless it unequivocally expressed its intention to do so. *See Nordic Village*, 503 U.S. at 33-34. The Court's task in determining the availability of damages in this case, therefore, "is to discern the 'unequivocally expressed' intent of Congress, construing ambiguities in favor of immunity." *United States* v. *Williams*, 115 S. Ct. 1611, 1616 (1995) (quoting *Nordic Village*, 503 U.S. at 33).

The D.C. Circuit, in *Dorsey*, rejected out of hand the contention that Congress intended monetary damages ever to be available for federal violations of Section 504, reasoning as follows:

> Because a § 504 private right of action for damages—against anyone—must be judicially implied from a statute silent on the subject, Dorsey is unable to point to any explicit language in the Rehabilitation Act * * * waiving the government's sovereign immunity. He therefore cannot prevail. [J.A. 26.]

Under this Court's cases, the D.C. Circuit's analysis is wrong for several reasons.

First, contrary to the view of the D.C. Circuit, determining whether Congress has waived immunity is not limited to looking in the statute for "explicit language * * * waiving sovereign immunity," and, if it is not there, ceasing the inquiry. Rather, waiver is a question "purely * * * of statutory *interpretation*" (emphasis added);[6] and, as this Court has often explained, waiver "is accomplished not by 'a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver

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[6] *Block* v. *North Dakota*, 461 U.S. 273, 287 (1983); *see United States* v. *Mitchell*, 463 U.S. 206, 232 (1983) (Powell, J., dissenting) (in determining whether Congress has waived immunity, "the ultimate question is one of congressional intent") (internal quotations omitted).

can only be ascertained with reference to underlying congressional policy."[7] As a consequence, this Court may discern that intent through various different statutory formulations; indeed, Congress may clearly express the necessary waiver without ever uttering the words sovereign immunity at all. *See Dellmuth* v. *Muth*, 491 U.S. 223, 233 (1989) (Scalia, J., concurring) (Congress may abrogate the States' Eleventh Amendment immunity "without explicit reference to state sovereign immunity or the Eleventh Amendment"); *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989) (in abrogating Eleventh Amendment immunity, "no magic words are required").[8]

Moreover, while the presumption that Congress does not intend to waive sovereign immunity is an important tool of statutory construction, it is not the *only* important tool available for ascertaining Congress' intent on the damage issue before this Court. Yet the D.C. Circuit used no other tools to discern that intent—such as analyzing the entirety of the statute, its history, and its purposes. In addition, it failed to apply other relevant presumptions about Congress' intent, including the presumption that Congress knew about and adopted pertinent decisions of this Court, such as *Franklin* v. *Gwinett County Public Schools*, *Cannon* v. *University of Chicago*, and *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624 (1984), when it enacted the Rehabilitation Act and its amendments. The lower court's limited inquiry was clearly wrong. As Justice O'Connor has explained:

> Although it is indeed true that the Court construes waivers of sovereign immunity strictly, that principle

[7] *Franchise Tax Bd. of Calif.* v. *United States Postal Serv.*, 467 U.S. 512, 521 (1984) (quoting *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939)).

[8] The Court has applied similar standards to abrogations of the States' Eleventh Amendment immunity and waivers of the federal government's sovereign immunity. *See Nordic Village*, 503 U.S. at 37.

> of statutory construction is no more than an aid in the task of determining congressional intent * * *. The mere observation that a statute waives sovereign immunity * * * cannot resolve questions of construction. The Court still must consider all indicia of congressional intent. [*Block* v. *North Dakota*, 461 U.S. at 293-94 (O'Connor, J., dissenting).][9]

The D.C. Circuit not only failed to consider other critical indicia concerning Congress' intent; it also overlooked that application of a "clear statement" rule in a case such as this one (where constitutional values are not directly implicated) is appropriate *only* where Congress' intent on the underlying issue is otherwise "ambiguous" or "in question."[10] Here, as we will show, there is no ambiguity on the issue of what Congress intended, provided all pertinent indicia of congressional intent are considered. Indeed, when those indicia are considered, there is simply no plausible reading of Congress' intent except that it intended for Griff Lane's damages to be compensated by the government in this case.

[9] *Accord United States* v. *Lopez*, 115 S. Ct. 1624, 1658-59 (1995) (Breyer, J., dissenting with Stevens, Souter, and Ginsburg, JJ.) ("any clear statement rule would apply only to determine Congress' intended result"); *id.* at 1655 ("clear statement rules * * * are merely rules of statutory interpretation") (Souter, J., dissenting).

[10] *See, e.g.*, *Lopez*, 115 S. Ct. at 1624 (clear statement rules are to be used "when legislation leaves [Congress'] intent subject to question") (Souter, J., dissenting); *Hilton* v. *South Carolina Public Rys. Comm'n*, 502 U.S. 197, 205, 206 (1991) (clear statement rule is merely an ordinary "rule of statutory construction" that is "to be applied where statutory intent is ambiguous"); *Gregory* v. *Ashcroft*, 501 U.S. 452, 470 (1991) ("plain statement rule" is a rule of "statutory construction to be applied where the statute is ambiguous") (citing *EEOC* v. *Wyoming*, 460 U.S. 226, 243-44 n.18 (1983)).

II. CONGRESS HAS CONSISTENTLY INDICATED ITS INTENTION THAT ALL VICTIMS OF DISABILITY DISCRIMINATION, INCLUDING VICTIMS OF FEDERAL-AGENCY DISCRIMINATION, SHOULD RECEIVE FULL AND EQUAL RELIEF

Respondents' position in this case is necessarily based on the view that Congress intended different forms of relief to be available for victims of discrimination by federal officials than for all other victims of discrimination. In fact, respondents' position must be based on the view that Congress intended full remedial relief (including attorneys' fees) to be available for all victims of disability discrimination—*unless* the discriminator is the federal government, in which case Congress intended to grant full declaratory and injunctive relief, and monetary relief in the form of attorneys' fees and back pay, but to exempt the federal government from the payment of money damages.[11] Indeed, under respondents' view, Congress would have allowed Lane to receive compensation if the discrimination at issue had caused him to lose income in the past (back pay), but it intended to deny him the $50,000 of his stipulated $75,000 in damages attributable to his lost income in the future.

There is simply no support for this view of Congress' intent anywhere in the statute, its history, its purposes, or the relevant case law. All of these indicators are directly to the contrary and convincingly demonstrate that Congress intended the federal government's liability

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11 This must be respondents' position because, as noted: respondents have not challenged the availability of injunctive relief and attorneys' fees against the federal government in this case; they have not disputed the availability of monetary damages against non-federal defendants, as required by *Franklin;* and they cannot dispute the availability of back pay against federal defendants, as made clear in *Darrone*, 465 U.S. at 631 n.10 ("Congress clearly intended to make back pay available to victims of discrimination by the Federal Government") (citation omitted).

under Section 504 to be on an *equal footing* with all other violators of the Act.

A. The 1973 Enactment of Section 504 Created A Private Right of Action

In Section 504 Congress prohibited discrimination on the basis of disability by any person or entity receiving Federal financial assistance. It has long been settled that the 1973 language of Section 504 was patterned on and is almost identical to the language in Title VI, just as Title IX was when it was adopted in 1972. *Alexander* v. *Choate*, 469 U.S. 287, 293 n.7 (1985); *Darrone*, 465 U.S. at 626; *Cannon*, 441 U.S. at 694-95. And just as this Court found in *Cannon* that Congress intended a private right of action to be available for victims of discrimination under Titles VI and IX, and that Congress knew when it adopted Title IX that Title VI had been construed to confer a private right of action, 441 U.S. at 703, so too have the lower courts for similar reasons unanimously concluded that Congress intended a private right of action under Section 504.[12] As the United States stated in its brief to this Court in *Darrone*, the contention that Congress did not intend a private right of

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12 Although this Court has never squarely ruled on the matter, it is settled law in the lower courts that Section 504 may be enforced by a private right of action. *See, e.g., Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d at 828 ("[E]very circuit that has addressed this question, including this one, has held that a private right of action exists"); Note, *Safeguarding Equality for the Handicapped: Compensatory Relief Under Section 504 of the Rehabilitation Act*, 1986 Duke L.J. 197, 197 ([F]ederal courts have uniformly agreed that an individual right of action is implied") (citing cases from ten circuits); Sarah Posten, *Developments in Federal Disability Discrimination Law: An Emerging Resolution to the Section 604 Damages Issue*, 1992/1993 Ann. Survey Am. L. 419, 423-424 (Jan. 1994) (same).

Furthermore, in *Darrone*, which held that a Section 504 plaintiff may recover back pay, this Court acknowledged that lower courts have relied on *Cannon* "in holding that such a private right exists under § 504." 465 U.S. at 630 n.7.

action under Section 504 would be "inconsistent with the language and history of the Rehabilitation Act" and "cannot be squared with this Court's decision in *Cannon* * * *." Brief for the United States as *Amicus Curiae* Supporting Respondent at *12, No. 82-862 (U.S. July 10, 1983) (LEXIS, Genfed library, U.S. file).

Moreover, it has also long been settled that absent an express statutory intent to the contrary in Title VI, Title IX, or Section 504—of which there is none—Congress intended that all forms of relief—including damages—would be available to victims of discrimination bringing these authorized private rights of action. *Franklin*, 503 U.S. at 70-71 ("absent clear direction to the contrary by Congress, the federal courts have the power to award any relief in a cognizable cause of action brought pursuant to a federal statute").

Accordingly, when Congress adopted Section 504 in 1973 it unquestionably intended those protected by Section 504 to be eligible for money damages from those who violated it.

B. The 1978 Amendments to Section 504 Authorized Private Claims Against Federal Defendants Without Any Express Reservation or Limitation

In 1978, Congress amended Section 504 in three important ways. Taken together, these amendments make quite clear that Congress intended money damages to be available against federal defendants, just as they were already available against non-federal defendants.

First, Congress made Section 504 expressly applicable to all federal agencies. It did so by adding to the end of the first sentence of Section 504, which bars "discrimination under any program or activity receiving Federal financial assistance," the words "or under any program or activity conducted by any Executive agency or by the United States Postal Service." Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Pub. L. No. 95-602, 92 Stat.

2955, 2982. This amendment was a reaction to a Department of Justice opinion dated September 23, 1977, which declared the federal government exempt from the statute. *See* 1 Op. Off. Legal Counsel 210 (1977); 124 Cong. Rec. 13,901 (May 16, 1978) (statement of Rep. Jeffords); *id.* at 38,551 (Oct. 14, 1978) (same). Significantly, in promulgating regulations implementing this amendment, the Department of Transportation itself recognized that "the intent expressed by supporters of the 1978 amendment in floor debate, including its sponsor, Rep. James M. Jeffords, [was] that the Federal Government should have *the same section 504 obligations as recipients of Federal financial assistance.*" 56 *Fed. Reg.* 37292, 37292 (1991) (emphasis added).

Thus, as noted by the Ninth Circuit in *Doe*, Representative Jeffords stated in debates over the 1978 Amendments that their purpose was "simply [to] extend[ ] the coverage of section 504 to include any function * * * of the Federal Government * * * * I think this is fair and appropriate and should go a long way toward developing a *uniform* and equitable national policy for eliminating discrimination." 941 F.2d at 791 (quoting 124 Cong. Rec. 13,901) (emphasis supplied).[13] *See id.* at 791-92 (quoting 124 Cong. Rec. 38,552) ("No one should discriminate against an individual because he or she suffers from a handicap—not private employers, not State and local governments, *and most certainly, not the Federal Government*") (Rep. Sarasin) (emphasis added).

Significantly, at the time of this 1978 Amendment, the four federal courts of appeals addressing the issue

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13 In *Cannon*, with regard to similar legislative history explaining the amendments to Title IX, the Court noted that it "would be remiss if [it] ignored [such] authoritative expressions concerning the scope and purpose" of the statute [there, Title IX], and "its place within [Congress'] civil rights enforcement scheme." 441 U.S. at 687 n.7.

already had unanimously concluded that Section 504 could be enforced through a private right of action.[14] And as *Cannon* made clear regarding the courts of appeals' similar constructions of Title VI at the time Title IX was adopted, it must be presumed: that Congress knew of the decisions construing Section 504; that those decisions reflected Congress' intent since, in reenacting the statute, Congress made no effort to reject the decisions; and that Congress "expected its enactment to be interpreted in conformity with them." *Cannon*, 441 U.S. at 696-98, 699. *Accord Franklin*, 503 U.S. at 71, 73; *Merrill Lynch, Pierce, Fenner & Smith, Inc.* v. *Curran*, 456 U.S. 353, 379 (1982).[15] It follows that the extension of Section 504 in 1978 to cover "any [federal] program or activity" effectuated Congress' intent to afford a private right of action against any federal agency operating a program or activity in a discriminatory fashion.

In addition, and for the same reason, the Congress amending Section 504 in 1978 must be deemed to have known of and to have intended to implement the long-standing "traditional rule" described in *Franklin*, a rule that "has been the prevailing presumption in our federal courts since at least the early 19th century" (503 U.S. at 71-72), *i.e.*, that in the absence of an express statement

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14 *See Davis* v. *Southeastern Community College*, 574 F.2d 1158 (4th Cir. 1978), *rev'd on other grounds*, 442 U.S. 397 (1979); *Leary* v. *Crapsey*, 566 F.2d 863 (2d Cir. 1977); *United Handicapped Fed'n* v. *Andre*, 558 F.2d 413 (8th Cir. 1977); *Lloyd* v. *Regional Transp. Auth.*, 548 F.2d 1277 (7th Cir. 1977).

15 Furthermore, Congress expressly stated in amending the Rehabilitation Act in 1974 that it intended Section 504 to "permit a judicial remedy through a private action" in order to assure effective enforcement of the statute. S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40, *reprinted in* 1974 U.S.C.C.A.N. 6373, 6390-91. This Court twice previously has recognized this "virtually contemporaneous" legislative history as shedding "significant light" on the meaning of Section 504. *Alexander* v. *Choate*, 469 U.S. at 306-07; *accord Darrone*, 465 U.S. at 432-33.

to the contrary, Congress intended all remedies (including damages) to be available to implement the Section 504 cause of actions it had created.[16] And significantly, as *Franklin* makes clear, this presumed availability of all forms of relief has long applied to cases against the federal government. 503 U.S. at 66-67.[17] See further discussion of this point, *infra* at 32-34.

At the same time, there is *nothing* in Congress' approach or its language to support respondents' view that Congress envisioned *different* damage remedies for federal and non-federal defendants under Section 504. Rather, as the Ninth Circuit underscored in *Doe*, in extending the Act's nondiscrimination requirement to "Executive agenc[ies], * * * Congress did not make the amendment to [Section 504] a new section; it did not even use a new sentence." 941 F.2d at 790. Instead, it simply added federal agencies to the list of those subject to the Act. Congress thereby plainly intended "violations of the new clause to be enforced in the same way as violations of the pre-existing clause." *Id.* It clearly would not have chosen this means to effectuate

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16 It has long been settled that the question of Congress' intent with regard to remedies is "analytically distinct" from the question whether a cause of action was created. *Davis* v. *Passman*, 442 U.S. 228, 239 (1979); *accord Franklin*, 503 U.S. at 65-66. As a result, once it has been determined that a cause of action was intended against the federal government under Section 504, it follows under *Franklin* that damages were intended as an available remedy in that cause of action. The D.C. Circuit in *Dorsey* confused these two separate issues when demanding "explicit language in the Rehabilitation Act" establishing a "§ 504 private right of action for damages" against federal agencies. J.A. 26.

17 Although in *Darrone* this Court did not have to reach the question of money damages under Section 504, as earlier noted the Court did hold in that case that "Congress clearly intended to make back pay available to victims of discrimination by the Federal Government * * *." 465 U.S. at 631 n.10. If Congress "clearly intended" back pay to be available, it is implausible to suppose—and there is nothing in the statute to suggest—that money damages were not to be available. *Franklin*, 503 U.S. at 75.

different or lesser damage remedies for federal as against non-federal defendants. *Id.*

Congress' other two 1978 amendments confirm this analysis. In Section 505(a)(2), Congress guaranteed to all plaintiffs in Section 504 cases the "remedies, procedures and rights set forth in Title VI." 29 U.S.C. § 794a(a)(2). And in Section 505(b), Congress approved attorneys' fees for all "prevailing parties" in Rehabilitation Act litigation, "other than the United States." 29 U.S.C. § 794(a)b. *See* 92 Stat. 2955, 2982-83.

In several ways, these two provisions confirm Congress' clear intent that damages should be available here. First, Congress nowhere differentiated among damage remedies available against federal and non-federal defendants, as respondents contend. Second, Congress expressed no reservation concerning the availability of *all* remedies under the "traditional rule" described in *Franklin*. Third, by expressly invoking the remedies available under Title VI, Congress confirmed that it intended damages to be available for violations of Section 504.[18]

Finally, by providing for attorneys' fees "in any action * * * to charge a violation" under the Act—except where the United States is a prevailing party—Congress both confirmed the availability of a private right of action and confirmed that when it wished to distinguish among parties with regard to remedies, it knew how to do so. Thus, having specifically limited the availability of one form of remedy in Section 505 *(i.e.*, no attorneys' fees for the United States), but not having elsewhere provided for any limitations or distinction among parties with regard to other remedies (including damages),

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[18] In 1983, "a clear majority" of this Court confirmed in *Guardians Ass'n.* v. *Civil Service Comm'n of City of New York*, 463 U.S. 582 (1983) that damages are available under Title VI for intentional violations of that statute. *Franklin*, 503 U.S. at 70.

Congress clearly did not intend any. *Lehman* v. *Nakshian*, 453 U.S. 156, 162 (1981); *see Russello* v. *United States*, 464 U.S. 16, 23 (1983). See further discussion of *Lehman*, *infra* at 34.

C. The 1986 Amendments Explicitly Rejected Any Distinction Between Private and Public Defendants with Regard to Remedies

Even if the 1978 Amendments did not make clear Congress' intent regarding the uniform availability of damages against all violators of the Act, the 1986 Amendments remove all doubt. In the latter Amendments, *see* 42 U.S.C. § 2000d-7, Congress first responded to this Court's decision in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1984), which had held that States were not liable to suit under Section 504 because they were nowhere expressly named in that Section.

Congress therefore specifically abrogated the States' Eleventh Amendment immunity under several statutes, including the Rehabilitation Act. More importantly for this case, Congress provided that:

> [i]n a suit against a State for a violation of [Section 504], remedies (*including remedies both at law and in equity*) are available for such a violation *to the same extent* as such remedies are available for such a violation in the suit against *any public or private entity* other than a State. [Rehabilitation Act Amendments of 1986, Pub. L. No. 99-506, 100 Stat. 1845, codified at 42 U.S.C. § 2000d-7(a)(2) (emphasis added).]

In *Franklin*, this Court held that the "remedies both at law and in equity" Congress referred to in this section are the full remedies contemplated under the "traditional rule," which includes damages. 503 U.S. at 72-73; *see*

id. at 78 (Scalia, J., concurring).[19] And, quite obviously, a federal agency—in this case, the Merchant Marine Academy—is a "public entity" against whom suit is otherwise authorized under Section 504.[20] Accordingly, the 1986 Amendments not only confirmed—again—that Congress had authorized a private right of action under

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19 Because "[i]t is always appropriate to assume that our elected representatives, like other citizens, know the law," *Traynor* v. *Turnage*, 485 U.S. 535, 546 (1988), reenactment of Sections 504 and 505 in 1986 following consistent federal appellate rulings allowing damages under the Act further confirms that Congress intended such relief to be available in private Section 504 actions (citation omitted). *See Kling* v. *County of Los Angeles*, 769 F.2d 532, 534 (9th Cir. 1985), *rev'd on other grounds*, 474 U.S. 936 (1985); *Carter* v. *Orleans Parish Public Schools*, 725 F.2d 261, 264 (5th Cir. 1984); *Marvin H.* v. *Austin Indep. School District*, 714 F.2d 1348, 1357 (5th Cir. 1983); *Ciampa* v. *Massachusetts Rehabilitation Comm'n*, 718 F.2d 1, 5 (1st Cir. 1983); *Miener* v. *Missouri*, 673 F.2d 969, 977-78 (8th Cir. 1981), *cert. denied*, 459 U.S. 909 (1982). *See also Smith* v. *Robinson*, 468 U.S. 992, 1020 n.24 (1984) ("Without expressing an opinion on the matter, we note that courts generally agree that damages are available under § 504").

20 There is simply no plausible construction of the term "any public entity * * * other than a State" that would exclude the federal government — and thus the Merchant Marine Academy as one of its components — from the coverage of Section 504. *Cf. Block*, 461 U.S. 273 at 287 ("*any* civil action" makes no exception for civil actions by States) (emphasis in original); *Pfizer, Inc.* v. *Government of India*, 434 U.S. 308, 312 (1978) ("any person" has a "naturally broad and inclusive meaning"); *International Union of Operating Eng'rs, Local 150* v. *Flair Builders, Inc.*, 406 U.S. 487, 491 (1972) (term requiring arbitration of "any difference" provides "nothing to limit the sweep of this language or to except any dispute or class of disputes from arbitration"); *see also League of United Latin American Citizens* v. *Wilson*, 1995 WL 699583, at *20-21 (C.D. Cal. Nov. 20, 1995) (plain meaning of "any public entity" in California statute broadly covers *all* state entities). *Accord Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d at 831-32 (§ 2000d-7(a)(2) "goes beyond this simple overruling of *Atascadero*," and affirms that "Congress has not overturned the presumption towards the full panoply of damages in the case of § 504").

Section 504, but also made explicit that Congress meant the traditional all-remedies rule to apply to those actions (including damages) and to apply uniformly against all public and private entities subject to those actions.

D. The 1992 Amendments Reaffirmed Congress' Intention to Provide All Remedies Against Federal Defendants

Finally, in its most recent periodic reexamination of the Rehabilitation Act, Congress in 1992 once again reenacted Section 504 and 505 and did so without amendment. Under *Cannon*, *Merrill Lynch*, and *Franklin*, this reenactment plainly signaled Congress' knowledge of, agreement with, and adoption of this Court's determinations in *Franklin* that: (1) the Title VI remedies authorized in Section 505 include damages; (2) the 1986 Amendments confirmed *Cannon*'s recognition of a Section 504 private right of action; (3) all remedies are available against all entities made subject to that cause of action, including the United States (since the key authorities supporting Franklin's all-remedies analysis involved claims against federal officers, *see infra* at 32-34); and (4) the "remedies at law and in equity" referred to in the 1986 Amendments included damages.[21]

In light of the confirmation of these points in the 1992 Amendments, there is simply no room to plausibly argue that Congress exempted only one kind of Section 504 violator—Federal agencies—from only one kind of remedy—monetary damages. As Senator Jeffords stated during debate on the 1992 Amendments, it was the "intent of Congress in 1978 to cover the Federal Government with the same anti-discrimination mandate which is applied to private recipients of Federal financial assistance" and therefore "[t]here can be no doubt that

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21 *See Lindahl* v. *OPM*, 470 U.S. 768, 782 n. 15 (1985) ("Congress is presumed to be aware of a[ ] * * * judicial interpretation of a statute and to adopt that interpretation when it reenacts a statute without change").

the 1978 amendments to section 504 provided a private right of action for victims of discrimination by the Federal Government." 138 *Cong. Rec.* S16,609 (daily ed. Oct. 5, 1992).

Moreover, referring by name to the Ninth Circuit's *Doe* and *J.L. & K.P.* decisions, Senator Jeffords said that the Ninth Circuit has "correctly [held] that 'Congress in enacting section 504, *waived sovereign immunity* and created a private cause of action against the Government.'" *Id.* (quoting *J.L. & K.P.*, 971 F.2d at 269) (emphasis added). He further explained that "[i]t would be a disgrace to allow a private right of action against private entities receiving Federal financial assistance, but to deny *the same remedy* against the Federal government when it discriminates." *Id.* (emphasis added). Finally, Senator Jeffords declared that "[t]here is no need to amend the Rehabilitation Act to provide a private right of action against the Federal Government as some have suggested. The language of the 1978 amendments is sufficient on its face to confer such a private right of action." *Id.*

Taken together, the 1973 Act, the 1978 Amendments, the 1986 Amendments, and the 1992 Amendments unmistakably confirm what Senator Jeffords has stated. Moreover, as next shown, the policies and purposes of the Act as well as other pertinent principles of statutory construction—including those applicable to waivers of sovereign immunity—confirm this proposition still further.

E. The Underlying Policies and Purposes of the Act Reaffirm Congress' Intent Still Further

As noted, this Court held unanimously in *Franchise Tax Board of California* that Congress' "intent to waive [sovereign] immunity and the scope of such waiver can only be ascertained by reference to underlying congressional policy." 467 U.S. at 521. And with regard to the specific statutory provision at issue, the Court unanimously held in *Darrone* that "language as broad as that of Section 504 cannot be read in isolation from its history and purposes." 465 U.S. at 633 n.13.[22] Accordingly, in determining Congress' intent on the issue of damages against the U.S. Merchant Marine Academy, it is important to examine the purposes both of the nondiscrimination policy of Section 504 as well as the key amendments to that Section.

It is well-settled that Congress' "central purpose [in] § 504" was "to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals."[23] It is also well-settled that to achieve that purpose, Congress focused on "several substantive areas," including employment and education,[24] "in which it considered the societal and *personal costs of refusals to provide meaningful access to the handicapped to be particularly high.*" *Alexander* v. *Choate*, 469 U.S. at 306-07 (emphasis added).[25] Furthermore,

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22 *Accord Southeastern Community College* v. *Davis*, 442 U.S. 397, 410, 411 (1979) (in construing Section 504, Court's "obligation[]" is to "honor the clear meaning of the statute, as revealed by its language, purpose, and history") (citation omitted).

23 *Traynor* v. *Turnage*, 485 U.S. at 548 (quoting *Alexander* v. *Choate*, 469 U.S. at 304, and *Southeastern Community College* v. *Davis*, 442 U.S. at 410).

24 *See, e.g.*, S. Rep. No. 1297, 93d Cong., 2d Sess. 28, 35 (1974), *reprinted in* 1974 U.S.C.C.A.N. 6373, 6400, 6407 ("Individuals with handicaps are all too often excluded from schools and educational programs * * *"; "[w]ithout adequate education, individuals with handicaps are doomed to a continued life as second-class citizens").

25 *Accord School Board of Nassau County* v. *Arline*, 480 U.S. 273, 278 n.3 (1987) (discussing focus of 1974 Amendments on expanding protection against "discriminatory practices in education * * * stemm[ing] from stereotypical attitudes and ignorance"); *id.* at 284 (primary purpose of Section 504 "is to ensure that handicapped individuals are not denied jobs or other benefits because of the prejudiced attitudes or ignorance of others").

as we have shown, it is quite clear from the 1978 and 1986 Amendments and their history that Congress' purpose in those amendments was to place the federal government on an "equal footing" with other entities regarding its responsibilities to enhance the stated goals, and to encourage private enforcement of those goals by granting full remedial relief and attorneys' fees to those who were discriminated against.[26] *See Doe*, 941 F.2d at 792.

Plainly, all of these congressional goals, purposes, and policies would be thwarted by denial of money damages in this case to Griff Lane. He was intentionally denied

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26 As presented in more detail by the *Amici Curiae* Brief of the American Association of Retired Persons, *et al.*, in support of petitioner, this Court repeatedly has recognized the crucial role played by damages relief in advancing Congress' goals under the civil rights laws; that is, such relief (1) encourages private enforcement, (2) deters future violations, and (3) makes victims whole. *See, e.g.*, *McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995); *City of Riverside* v. *Rivera*, 477 U.S. 561, 575 (1986) (plurality); *Owen* v. *City of Independence*, 445 U.S. 622, 651-52 (1980); *Carey* v. *Piphus*, 435 U.S. 247, 253-58 (1978); *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763-65 (1976); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 417-18 (1975); *Newman* v. *Piggie Park Enters., Inc.*, 390 U.S. 400, 402 (1968).

Furthermore, in legislative debate, members of the Senate made clear that the attorneys' fees provision of the 1978 Amendment was "intended * * * to parallel" the Civil Rights Attorneys' Fees Act of 1976, 42 U.S.C. § 1988, which itself was premised on the thesis that "civil rights law[s] depend heavily on private enforcement, and fee awards have proved an essential remedy if private citizens are to have a meaningful opportunity to vindicate [such] congressional policies." *Doe*, 941 F.2d at 792 (quoting S. Rep. No. 1011, 94th Cong., 2d. Sess. 2 (1976), *reprinted in* 1976 U.S.C.C.A.N. 5908, 5910). In particular, Senator Cranston declared that private enforcement of protections secured by Title V of the Rehabilitation Act was a "necessary aspect of assuring that these rights are vindicated and enforcement is *uniform*." *Doe*, 941 F.2d at 972 (quoting 124 *Cong. Rec.* 30,346) (Sept. 20, 1978) (emphasis added).

educational opportunity and impeded in his career based solely on his disability. As a result, he brought the very enforcement suit Congress encouraged, in order to be made whole for the precise harm Congress prohibited, by requesting that the discriminator pay undisputed "personal costs" he had borne and which Congress found unacceptable. Had this harm and these costs been imposed on him by a private party or a *state* merchant marine academy, he indisputably would be entitled to money damages for this harm and these costs.[27] In these circumstances, it is inconceivable that Congress intended to deny him relief simply because he chose instead to attend the *United States* Merchant Marine Academy.

III. THIS COURT'S SOVEREIGN IMMUNITY JURISPRUDENCE CONFIRMS THE AVAILABILITY OF DAMAGES AGAINST FEDERAL DEFENDANTS UNDER SECTION 504

The only remaining question is whether this Court's sovereign immunity jurisprudence requires that Congress' clear intent to permit damages in a case such as this must be rejected. For several reasons, it does not.

First, as noted, that jurisprudence is not a substitute for considering the other indicia of congressional intent. To

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27 State merchant marine academies are plainly covered by Section 504. *See, e.g.*, *United States* v. *Massachusetts Maritime Academy*, 762 F.2d 142, 144, 148 (1st Cir. 1985) (in suit brought by U.S. under Title IV of the 1964 Civil Rights Act based on state maritime academy's receipt of federal funds, court of appeals indicates academy would be subject to private enforcement action under Title VI). In 1994 and 1995, federal aid to six state merchant marine academies exceeded $9 million. Each school received "direct annual payments," "incentive payments in support of [student] cadets," "suitable vessels for use as training ships," as well as subsidies for "alteration, maintenance and repair of such vessels." *See* 46 U.S.C. § 1295(c); *Justification of the Budget Estimates: Hearings Before a Subcomm. of the House Comm. on Appropriations*, 104th Cong., 1st. Sess. 775, 806-07, 809-10 (1995) (fiscal year 1996 budget submission by MARAD, Department of Transportation).

the contrary, sovereign immunity analysis is simply one tool that may be used in discerning that intent, and it becomes useful only when that intent is otherwise ambiguous. *See supra* at 12-13. Here, as shown, Congress' intent is clear.

Second, this Court's sovereign immunity cases actually confirm that Congress intended damages to be available here. The cases that best illustrate the Court's approach to the issue are *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), and *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976).

In *Nordic Village* the Court determined the extent to which Congress waived the immunity of the United States for claims against it by bankrupt estates. As the Court explained, in Section 106 of the Bankruptcy Code[28] Congress contemplated three different situations in which such claims might be brought: as compulsory counterclaims; as permissive counterclaims; and as

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28 At the time *Nordic Village* was decided, Section 106 provided as follows:

> (a) A governmental unit is deemed to have waived sovereign immunity with respect to any claim against such governmental unit that is property of the estate and that arose out of the same transaction or occurrence out of which such governmental unit's claim arose.
>
> (b) There shall be offset against an allowed claim or interest of a governmental unit any claim against such governmental unit that is property of the estate.
>
> (c) Except as provided in subsections (a) and (b) of this section and notwithstanding any assertion of sovereign immunity—
>
> (1) a provision of this title that contains 'creditor,' 'entity,' or 'governmental unit' applies to governmental units; and
>
> (2) a determination by the court of an issue arising under such a provision binds governmental units. [11 U.S.C. § 106 (1988)].

claims in all other situations. As the Court also explained, in Section 106(a) and (b), respectively, Congress clearly waived sovereign immunity (including for damages) for compulsory counterclaims, and for permissive counterclaims (again including for damages), but capped by a setoff limitation. 503 U.S. at 34. However, the Court concluded that "[n]ext to these models of clarity," Section 106(c), which governed other types of claims against the government in bankruptcy, did not waive sovereign immunity for damages. *Id.* This conclusion was based on the observation that Congress clearly intended that different treatment be given to claims under the three different subsections of Section 106, and that subsection (c) was ambiguous and could plausibly be interpreted to waive the immunity of the government for declaratory and injunctive relief but not for monetary relief. *Id.* at 34-35.

The statutory scheme in this case is entirely different and serves entirely different purposes. Unlike the three subsections of Section 106 of the Bankruptcy Code, each addressing sovereign immunity for a different type of claim against the government, the Rehabilitation Act treats all defendants and all claims against the government identically. Thus, in Section 504, private and public entities (including federal agencies) are uniformly made subject to the nondiscrimination provision; in Section 505, Title VI remedies are made uniformly available against all these entities; and in the 1986 Amendments all legal and equitable relief is uniformly made available against all these entities. There is, quite simply, not one word in the Act limiting remedies against any of these entities or in any way differentiating their liability. And there is certainly no counterpart here to Section 106(c) of the Bankruptcy Code, which affirmatively distinguished between declaratory and injunctive relief on the one hand, and monetary relief on the other. Accordingly, unlike the Bankruptcy Code, there is nothing in the Rehabilitation Act that plausibly raises an ambiguity about Congress' intent on that point, much

less an affirmative indication that Congress meant to carve out *only* federal defendants for exemption *only* from damages. Rather, all affirmative indications are to the contrary.[29]

Fitzpatrick v. *Bitzer* confirms that Congress' approach here was more than sufficient to waive sovereign immunity for damages. In that case, then-Justice Rehnquist, writing for the Court, noted that Congress effectively abrogated the States' Eleventh Amendment immunity for money damages in the form of back pay under Title VII simply by adding "governments" to the list of those covered by that statute, and by including government employees in the class of persons who could bring suit if dissatisfied with the administrative handling of their claim. 427 U.S. at 449 n.2. This was held sufficient to abrogate immunity for payment of back pay even though abrogation was never mentioned in the statute and even though the section of Title VII that allows back pay as a remedy was not amended to specifically include governmental defendants. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103; and *compare* 42 U.S.C. § 2000e-5(f) (including "government" as a respondent in section describing administrative procedures) *with* § 2000e-5(g) (section providing back pay as remedy omits "government").

Furthermore, although abrogation was not disputed by the parties in *Fitzpatrick*, the brief of the United States argued at length that the stated amendments were sufficient to show Congress' clear intent to abrogate the States' Eleventh Amendment immunity and contended that "to suggest otherwise would be to hold Congress to a degree of legislative specificity it could not and does not customarily meet." Brief for the United States as

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29 Indeed, as noted, the single time Congress drew any distinction among parties subject to the Act, it did so solely to deny attorneys' fees to the United States.

Amicus Curiae at 19, *Fitzpatrick* v. *Bitzer*, Nos. 75-251 and 75-283 (citation omitted).

What happened in *Fitzpatrick* happened here. In 1978 Congress added "Executive agencies" to Section 504 coverage just as Congress had added "governments" to Title VII coverage in 1972. And just as this Title VII amendment was sufficient to abrogate the government's immunity regarding relief otherwise available under that Title, so too was the "Executive agency" amendment sufficient to waive those agencies' immunity regarding relief otherwise available under Section 504—which unquestionably has always included damages under *Franklin*.

In fact, this case is stronger than *Fitzpatrick*. For even if the 1978 Amendment to Section 504 alone was not sufficient under *Fitzpatrick* to demonstrate the requisite waiver, that amendment in conjunction with other parts of the Act would certainly be sufficient to do so. In Section 505 Congress specified that remedies available under the Act would be those under Title VI (which includes damages), and that those remedies would include attorneys' fees. And in the 1986 Amendments, Congress reaffirmed that equitable and legal remedies would be available without limitation against all covered entities, both public and private.

Nowhere in these provisions did Congress differentiate among different remedies available to affected parties; and nowhere did it limit monetary relief against any covered entity. As *Nordic Village* and other cases demonstrate, Congress knows how to limit remedies or differentiate among parties as to available remedies when it chooses to do so. And in fact it did so here with regard to denying attorneys' fees to the United States in Section 505. Accordingly, having not incorporated any distinction or limitation with regard to damages against federal agencies in the Rehabilitation Act, it cannot be thought to have intended any such limitation. *See Lehman* v. *Nakshian*, 453 U.S. at 162 (when Congress

expressly provided for jury trials in ADEA actions against state and local defendants, but not against federal defendants, it intended no waiver of federal immunity regarding jury trials).

This analysis is confirmed still further by *Franklin*. There, as noted, this Court unanimously held that money damages may be recovered in a suit brought under Title IX and reaffirmed the traditional rule that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71. This rule, the Court said, is "well settled" and "has deep roots in our jurisprudence." *Id.* at 68, 66. It can hardly be disputed that this rule applies to Section 504, just as it did to Title IX, inasmuch as both were patterned on Title VI. Nor can there be any dispute that the rule applies to federal and non-federal defendants alike. For although *Franklin* itself was not a case against the federal government, the key decisions cited by the Court in tracing the "deep roots" of the rule all involved suits against the federal government or federal actors.

Thus, the Court first quoted *Bell* v. *Hood* for the principle that "[w]here legal rights have been invaded, and a federal statute provides for a general right to sue for such invasion, federal courts may use any available remedy to make good the wrong done." *Bell* v. *Hood*, 327 U.S. 678, 684 (1946). *Bell* v. *Hood* concerned an action for money damages against FBI officers and held that the district court had jurisdiction to entertain the suit. *Id.* at 685. Next, the *Franklin* Court discussed *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137 (1803), which involved a suit against the Secretary of State. The *Franklin* Court also relied on *Dooley* v. *United States*, 182 U.S. 222, 229 (1901), a suit against the United States to recover duties improperly collected, for "the principle that a

liability created by statute without a remedy may be enforced by a common-law action."[30]

Perhaps most significantly, the *Franklin* Court relied on *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838). As explained in *Franklin*, *Kendall* involved "an act of Congress that accorded a right of action in mail carriers to sue for adjustment and settlement of certain claims for extra services but which did not specify the precise remedy available to the carriers." 503 U.S. at 67. *Kendall* held that the mail carriers were entitled to payment from the government on the ground that it would be "a monstrous absurdity" to give the carriers a right without that remedy. 37 U.S. at 624. Significantly, in reaching this holding the *Kendall* Court expressly rejected the argument of Attorney General Butler that sovereign immunity barred the relief sought. He had contended that because "[t]he United States are the real party defendants; the object of the suit being to cancel balances in the treasury books, and to reach public moneys in the treasury," the suit is subject to the "the general objection, that the government is not suable, except when it chooses to waive its immunity in this respect." *Id.* at 587.

The *Franklin* Court relied on *Kendall* for the proposition that the federal judiciary's authority to award all appropriate relief—including damages—"historically has been thought necessary to provide an important safeguard against abuses of legislative and *executive power*." 503 U.S. at 74 (emphasis added). It is just such an abuse of executive power that is at issue in this case and that Congress expressly prohibited in Section 504. And, as the *Franklin* Court made clear, failure to effectuate Congress' intent to make damages available for the abuse of executive power presented here "would harm

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30 As its source for this proposition, the *Dooley* Court in turn relied on another case against the federal government, *United States* v. *Kaufman*, 96 U.S. 567 (1877).

separation of powers principles * * * by giving judges the power to render inutile causes of action authorized by Congress * * *." 503 U.S. at 74.

Other sovereign immunity cases confirm still further the appropriateness of construing Congress' waiver in this case against the backdrop of the all-remedies principle recognized in *Franklin*. In *Lehman* v. *Nakshian*, the Court held that in past instances of waiving sovereign immunity the Congress "almost always conditioned that waiver upon a plaintiff's relinquishing any claim to a jury trial." 453 U.S. at 161. Accordingly, in construing the scope of the waiver in that case, the Court assumed that no jury trial was authorized unless Congress said so expressly. *Id.* at 162. Similarly, in *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986), the Court held that "[f]or well over a century, this Court, executive agencies, and Congress itself consistently have recognized that federal statutes cannot be read to permit interest to run on a recovery against the United States unless Congress affirmatively mandates that result." 478 U.S. at 316. Accordingly, even though Congress waived the federal government's sovereign immunity with regard to damages under Title VII, the Court concluded that this waiver could not include interest, since Congress had not separately, expressly authorized it. This was so, the Court said, because "waivers of sovereign immunity to suit must be read against the back-drop of the no-interest rule." *Id.* at 319.

Here, by contrast, the undoubted waiver of sovereign immunity created by the Rehabilitation Act must be read against the back-drop of the traditional rule confirmed in *Franklin*, *i.e.*, that all remedies are presumed to be available when Congress creates a cause of action, unless Congress expressly provides to the contrary. Here, Congress clearly has not done so, and the waiver now at issue should be construed in light of that principle, just as in *Lehman* and *Shaw* the waiver was construed in light of the no-jury and no-interest principles presented in those cases.

Finally, in determining whether Congress intended to waive sovereign immunity as to damages, three other principles of statutory construction apply here, all of them overlooked by the D.C. Circuit in *Dorsey*, and all of them confirming that Congress intended a waiver. First, because the presumption against waiver is in turn premised on the presumption that Congress would have wanted to avoid certain intrusions against the federal government,[31] the nature and degree of that intrusion should be examined in the case at hand. *Larson* v. *Domestic and Foreign Commerce Corp.*, 337 U.S. 682, 704 (1949). Here, it is conceded that injunctive relief and attorneys' fees are permitted against the government; and it must also be conceded that Congress intended back pay to be available against the government.[32] As a result, the only question is whether Congress intended to permit these three intrusions, but still forbid money damages. This is surely implausible, for the reasons suggested by the Court in *Larson*:

> It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible. There may be substance in such a viewpoint as applied to suits for damages. The Congress has increasingly permitted such suits to be maintained against the sovereign and we should give hospitable scope to that trend. But the reasoning is not applicable to suits for specific relief. For, it is one thing to provide a method by which a citizen may be compensated for a wrong done to him by the

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31 *See Larson*, 337 U.S. at 704 ("The interference of the Courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief") (quoting *Decater* v. *Paulding*, 39 U.S. (14 Pet.) 497, 516 (1840)).

32 *Darrone*, 465 U.S. at 631 n.10.

> Government. It is a far different matter to permit a court to exercise its compulsive powers to restrain the Government from acting, or to compel it to act. [337 U.S. at 703-04.][33]

Second, it must be recognized that whether Congress intended to waive sovereign immunity at all is a different issue than the one presented here: the *scope* of the waiver Congress clearly intended. In the latter situation, "the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.'"[34] Here, where all statutory indications are that Congress intended the United States to be treated equally with all other defendants and that all such defendants be subject to all traditional forms of relief, including damages, it would "narrow the waiver" to exclude the United States from damages liability.

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33 *Larson* was confirmed in *Franklin*, where the Court observed that to suppose that Congress intended to grant equitable relief under Title IX, but not legal relief, "conflicts with sound logic." 503 U.S. at 75. As the Court noted, "it is axiomatic" that "[u]nder the ordinary convention" legal relief (including damages) is to be considered before equitable relief is resorted to. *Id.* at 75, 76. There is nothing here to indicate that Congress intended to depart from this long-standing principle.

34 *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (quoting *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979)). *See United States* v. *Williams*, 115 S. Ct. at 1620 (1995) (Scalia, J., concurring) ("The exemption of the sovereign from suit involves hardship enough where consent has been withheld. We are not to add to its rigor by refinement of construction where consent has been announced") (quoting *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 383 (1949), quoting *Anderson* v. *John L. Hayes Constr. Co.*, 243 N.Y. 140, 147, 153 N.E. 28, 29-30 (1926) (Cardozo, J.)). *See also United States* v. *Mitchell*, 463 U.S. 206, 213 (1983) ("it is 'as much the duty of Government to render prompt justice against itself, in favor of citizens, as it is to administer the same between private individuals'") (quoting President Lincoln's 1861 State of the Union Message, printed in *Cong. Globe*, 37th Cong., 2d Sess., App. 2 (1861)).

If there still remains any doubt concerning the extent of Congress' waiver in Section 504, the last important principle of statutory construction should resolve that doubt in Griff Lane's favor. This Court's sovereign immunity cases hold that when a statute is designed by Congress to create new rights for the protection of a group of individuals, the Court should liberally interpret any waiver of sovereign immunity appearing in the statute in order to benefit those individuals. For example, in *Bowen* v. *City of New York*, 476 U.S. 467 (1986), the Court interpreted a waiver of sovereign immunity contained in the Social Security Act. In support of its determination that Congress intended its waiver to include the doctrine of equitable tolling to the statute of limitations, the Court considered that "[t]he statute of limitations we construe * * * is contained in a statute that Congress designed to be 'unusually protective' of claimants." *Id.* at 480 (citation omitted).

This principle was recently articulated in the dissent of Chief Justice Rehnquist in *United States* v. *Williams*, *supra*, a case construing Congress' waiver of sovereign immunity under the Internal Revenue Code. There, the Chief Justice noted that the majority's interpretation of the Tax Code sections at issue would be proper "[i]f this case involved the interpretation of a statute designed to confer new benefits or rights upon a class of individuals * * * since such a statute would be 'entitled to a liberal construction to accomplish its beneficent purposes.'" 115 S. Ct. at 1623-24 (Rehnquist, C.J., dissenting) (citing *Cosmopolitan Shipping Co.* v. *McAllister*, 337 U.S. 783 (1949) (construing the Jones Act) and *Atchison, T. & S.F.R. Co.* v. *Buell*, 480 U.S. 557, 562 (1987) (Federal Employers' Liability Act "is a 'broad remedial statute'" which must be given a "'liberal construction'")). However, such an interpretation was not proper, concluded the *Williams* dissenters, when interpreting a statute like the Tax Code. *Id.*

Like the Jones Act and the Federal Employers' Liability Act, and unlike the Tax Code, the Rehabilitation Act is a broad remedial statute intended to confer new rights on a class of individuals and, accordingly, it is entitled to a liberal construction.[35] Therefore, the waiver Congress included in the Rehabilitation Act is entitled to a liberal construction in order to benefit those, like Griff Lane, who have been discriminated against by the government and monetarily harmed thereby. Indeed, if the Court concludes that Congress intended that damages are never available for the federal government's violations of Section 504, it is inevitable that some victims of those violations will be left completely without a remedy.[36] In *Williams* and *Franklin*, this factor reinforced the Court's conclusion that Congress intended to waive sovereign immunity. 115 S. Ct. at 1618; 503 U.S. at 76. It should likewise do so here.

* * *

In determining the scope of a congressional waiver of sovereign immunity, the Court prefers "common sense inquiries over formalism," *Williams*, 115 S. Ct. at 1618, and it does not permit those waivers "to be given a meaning that is implausible." *Id.* at 1620 (Scalia, J. concurring). Here, the only sensible, plausible reading of Section 504 is that Congress meant to put federal

35 *See Traynor* v. *Turnage*, 485 U.S. at 548 ("central purpose of § 504 * * * is to assure that handicapped individuals receive 'evenhanded treatment' in relation to nonhandicapped individuals") (citations omitted); *Darrone*, 465 U.S. at 634 (discussing the "remedial purpose of the Rehabilitation Act"); *Johnson* v. *Runyon*, 47 F.3d 911, 917 (7th Cir. 1995) ("Rehabilitation Act is remedial legislation that must be construed liberally to effectuate its purposes"); *Heilweil* v. *Mount Sinai Hosp.*, 32 F.3d 718, 722 (2d Cir. 1994) ("the [Rehabilitation] Act is a remedial statute * * * to be construed broadly"), *cert. denied*, 115 S. Ct. 1095 (1995).

36 *See, e.g., Doe*, 941 F.2d at 784 (holding injunctive claims moot, leaving only claims for damages where plaintiff has become too ill during the course of litigation to perform his job).

agencies on an equal footing with non-federal parties when it added those agencies to that section in 1978, that it knew that such equal footing included liability to a private action in which full legal and equitable relief would be available, that it confirmed this view in its 1986 and 1992 Amendments, and that it intended someone like Griff Lane to be made whole for the undisputed discrimination and harm the government has caused him.

CONCLUSION

The judgment of the Court of Appeals should be reversed.

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In the Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE, PETITIONER

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Whether Congress has waived the federal government's sovereign immunity against awards of money damages for violations of Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, which prohibits, inter alia, discrimination on the basis of disability "under any program or activity conducted by any Executive agency." 29 U.S.C. 794(a) (Supp. V 1993).

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) summarily affirming the district court order denying compensatory damages is not reported. The district court order denying compensatory damages (Pet. App. 5a-10a) is not reported. The earlier opinion and order of the district court regarding liability and other remedies (Pet. App. 11a-63a) is reported at 867 F. Supp. 1050.

JURISDICTION

The judgment of the court of appeals was entered on June 5, 1995. The petition for a writ of certiorari was filed on September 5, 1995 (a Tuesday following a legal holiday), and was granted on January 5, 1996 (116 S.

Ct. 689). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

1. Section 504(a) of the Rehabilitation Act of 1973 (Rehabilitation Act), 29 U.S.C. 794(a) (Supp. V 1993), provides:

> No otherwise qualified individual with a disability in the United States, as defined in section 706(8) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978. Copies of any proposed regulation shall be submitted to appropriate authorizing committees of the Congress, and such regulation may take effect no earlier than the thirtieth day after the date on which such regulation is so submitted to such committees.

Other pertinent provisions of the Rehabilitation Act, §§ 501(b), 505(a)(1) and (2), and 505(b), 29 U.S.C. 791(b), 794a(a)(1) and (2), and 794a(b) (1988 & Supp. V 1993), are reprinted at App., *infra*, 1a-2a.

2. Section 1003(a) of the Rehabilitation Act Amendments of 1986, 42 U.S.C. 2000d-7(a), is reprinted at App., *infra*, 3a.

3. Section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d, is reprinted at App., *infra*, 4a.

4. Section 901 of the Education Amendments of 1972, 20 U.S.C. 1681, is reprinted at App., *infra*, 4a.

5. Section 303 of the Age Discrimination Act of 1975, 42 U.S.C. 6102, is reprinted at App., *infra*, 5a.

6. Section 102 of the Civil Rights Act of 1991, 42 U.S.C. 1981a (Supp. V 1993), is reprinted in pertinent part at App., *infra*, 5a-7a.

STATEMENT

1. This suit arose as a result of petitioner's separation from the United States Merchant Marine Academy (Academy) in December, 1992. The Academy is a federal service academy that trains men and women to serve as commercial merchant marine officers and as commissioned officers in the United States armed forces. The Academy is administered by the Maritime Administration, an organization within the Department of Transportation. Pet. App. 15a & n.3.

Petitioner applied for an appointment to the Academy in 1990. After passing a physical examination conducted by the Department of Defense and meeting the Academy's other requirements for appointment, petitioner entered the Academy in July, 1991. Pet. App. 15a-16a. After his enrollment, a private physician discovered that petitioner had diabetes mellitus. *Id.* at 16a. When the Academy was informed of the diagnosis, *id.* at 16a-17a, it convened a hearing before the Academy's Physical Examination Review Board. The Board confirmed petitioner's condition and advised the Academy Superintendent that petitioner had insulin-dependent diabetes, a disqualifying condition for military service under United

States Navy commissioning standards. The Board stated that there was also a question regarding Coast Guard licensing because, although the Coast Guard's merchant marine licensing requirements are less rigid than the requirements for military service, a waiver is required for an insulin-dependent applicant; such a waiver depends on the specifics of the condition. *Id.* at 17a.

The Academy Superintendent then advised petitioner that diabetes disqualified him for military service, rendering him ineligible to be commissioned for service in the Navy/Merchant Marine Reserve Program or as a Naval Reserve officer. Pet. App. 17a-18a. The Superintendent notified petitioner that he would be separated from the Academy in December, 1992, at the end of the semester. *Id.* at 18a. Petitioner contacted the then-Administrator of the Maritime Administration to challenge the Superintendent's decision.

The Administrator reviewed the matter and permitted petitioner a further opportunity to demonstrate that he was physically eligible for a Coast Guard license and a reserve officer's commission. Pet. App. 19a; Exh. 11 to Pltf.'s Mot. for Prelim. Inj. Ultimately, the Administrator informed petitioner that he had not demonstrated that he met the Academy's physical qualifications because "insulin dependent diabetes disqualifies an individual from receiving a commission in any component of the reserve of the armed forces of the United States." Pet. App. 19a. The Administrator stated that the Maritime Administration had long interpreted the statutory requirements for appointment to the Academy to require that candidates for admission to, and midshipmen at, the Academy meet the physical

requirements for reserve officers established by the Department of the Navy. Exh. 13 to Pltf.'s Mot. for Prelim. Inj. 4. The Administrator concluded that petitioner would not be readmitted to the Academy until he could show that he met those standards. *Id.* at 5.

2. Petitioner filed suit in the United States District Court for the District of Columbia against the Secretary of Transportation and other federal officials, in their official capacities, contending that his dismissal from the Academy violated the Maritime Education and Training Act of 1980, 46 U.S.C. App. 1295 *et seq.*, and Section 504(a) of the Rehabilitation Act of 1973, 29 U.S.C. 794(a) (Supp. V 1993). Pet. App. 12a. Section 504(a) protects an "otherwise qualified" individual from discrimination based on a disability in, inter alia, any program or activity conducted by a federal executive agency. 29 U.S.C. 794(a) (Supp. V 1993). Petitioner sought immediate reinstatement to the Academy, compensatory damages (including out-of-pocket expenses, loss of professional opportunity, and pain and suffering), attorneys' fees, and costs. Pet. App. 12a.

On October 26, 1994, the district court granted summary judgment for petitioner and ordered his immediate reinstatement. Pet. App. 11a-63a.[1] The court concluded that the Maritime Education and Training Act of 1980, 46 U.S.C. App. 1295 *et seq.*, "does not contain a clear statutory requirement that every

[1] The federal defendants initially filed an appeal from the district court's grant of injunctive relief to petitioner, but that appeal was later dismissed pursuant to Federal Rule of Appellate Procedure 42(b). See J.A. 28-30. Whether a violation of the Rehabilitation Act occurred is not at issue in this case.

cadet both serve in, and at all times meet physical qualifications for, commissioning in the armed forces reserve," and that, therefore, respondents were not obliged to separate petitioner from the Academy for failure to meet such physical requirements. Pet. App. 26a, 28a-49a. The court also ruled that respondents had violated Section 504 of the Rehabilitation Act by disenrolling petitioner solely on the basis of his diabetes mellitus, without attempting a reasonable accommodation or making an individualized determination. *Id.* at 27a, 49a-56a. Petitioner subsequently re-enrolled at the Academy and resumed his studies. Pet. Br. 6 n.2.

In its October 26 order, the district court also ruled that petitioner was entitled to compensatory damages under Section 504(a) of the Rehabilitation Act. Pet. App. 57a-60a. On December 16, 1994, however, the District of Columbia Circuit held, in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551, that the Rehabilitation Act does not waive the federal government's sovereign immunity against awards of money damages for violations of Section 504(a).[2] The D.C. Circuit acknowledged in *Dorsey* that its ruling conflicts with the Ninth Circuit's ruling in *Doe* v. *Attorney General of United States*, 941 F.2d 780 (1991). *Dorsey*, 41 F.3d at 1552-1553, 1555 (J.A. 22, 26).[3] In *Doe*, the Ninth Circuit had held that compensatory damages for Section 504(a) violations are available

[2] The D.C. Circuit's opinion in *Dorsey* is reproduced in the Joint Appendix at J.A. 21-27.

[3] On November 27, 1995, the Attorney General and other federal parties filed a petition for a writ of certiorari in *Doe*, suggesting that the Court hold the petition pending disposition of the instant case. *Reno* v. *Doe*, No. 95-830.

against all defendants, including the federal government. 941 F.2d at 794-795. The D.C. Circuit disagreed, ruling that sovereign immunity barred recovery of monetary damages against federal executive agencies for their violations of Section 504(a). The *Dorsey* court emphasized that the fact "[t]hat damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing [from] private parties." 41 F.3d at 1555 (J.A. 26-27). The *Dorsey* court recognized that sovereign immunity waivers must be explicit and unambiguous, and it found no such explicit waiver of immunity against money damages in Section 504(a). *Ibid.*, citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). The court also found the legislative history of Section 504(a), on which the *Doe* court relied, to be "at the very best * * * ambiguous" and not a sufficient basis for concluding that Congress had waived sovereign immunity against money damages. 41 F.3d at 1555 (J.A. 27).

In light of *Dorsey*, the district court in this case vacated its prior ruling awarding compensatory damages and entered a new order, ruling that petitioner is not entitled to such relief. Pet. App. 5a-7a. The court of appeals summarily affirmed. *Id.* at 1a-2a.

SUMMARY OF ARGUMENT

The language, structure, and history of the Rehabilitation Act of 1973, 29 U.S.C. 791 *et seq.*, reveal that Congress did not waive the federal government's sovereign immunity against awards of money damages for violations of Section 504(a) of the Act.

Section 504(a) prohibits discrimination based on disability in two settings—in any program or activity receiving federal financial assistance, and in any program or activity conducted by a federal executive agency. 29 U.S.C. 794(a) (Supp. V 1993). In the first setting, where the defendant is a federal fund recipient, this Court's decision in *Franklin* v. *Gwinnett County Pub. Sch.*, 503 U.S. 60, 73 (1992), indicates that monetary damages are available as a remedy for the recipient's discrimination. The Court has never addressed whether monetary damages are available in the second setting, where discrimination occurs in a program or activity conducted by a federal executive agency.

Whether monetary damages are available against a federal defendant under Section 504(a) depends on whether Congress has waived the federal government's sovereign immunity against such a remedy. It is well settled that waivers of sovereign immunity must be unequivocally expressed and will not be implied. *Library of Congress* v. *Shaw*, 478 U.S. 310 (1986). Waivers of immunity must not be extended beyond what the relevant statutory language requires and, if money damages are sought, any waiver must unambiguously extend to such monetary claims. *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992). The legislative history of a statute cannot supply a waiver that does not appear unequivocally in the statutory text. *Id.* at 37.

The Rehabilitation Act does not contain a textual waiver of federal sovereign immunity against awards of money damages in cases where a federal executive agency's program or activity violates Section 504(a). The overall structure of the Rehabilitation Act and provisions relating to remedies for violations of

sections other than Section 504(a) confirm that Congress did not, in fact, intend to enact such a waiver. The contemporaneous legislative history further supports that conclusion.

Petitioner urges the Court to find a waiver of federal sovereign immunity based primarily on the argument that Congress did not express an intention to treat federal defendants differently from non-federal defendants, and that damages against federal defendants should therefore be available because the Court has ruled that "all appropriate relief," including monetary damages, is available against non-federal defendants under parallel statutes that apply to federal fund recipients. *Franklin* v. *Gwinnett County Pub. Sch.*, *supra* (Title IX of the Education Amendments of 1972); *Guardians Ass'n* v. *Civil Serv. Comm'n of New York City*, 463 U.S. 582 (1983) (Title VI of the Civil Rights Act of 1964).

Contrary to petitioner's contention, Congress expressly treated federal executive agencies differently from federal fund recipients for purposes of remedies for violations of Section 504(a). See 29 U.S.C. 794a(a)(2) (incorporating Title VI remedies in cases where the discriminator is a federal fund recipient, but not providing for such remedies in cases where the discrimination occurs in a program or activity conducted by a federal executive agency). Case law regarding the remedies available under Title VI and Title IX cannot be applied to cases involving programs or activities conducted by federal executive agencies under Section 504(a) because Title VI and Title IX are only applicable to federal fund recipients.

ARGUMENT

CONGRESS HAS NOT WAIVED THE FEDERAL GOVERNMENT'S SOVEREIGN IMMUNITY AGAINST AWARDS OF MONEY DAMAGES FOR VIOLATIONS OF SECTION 504(a) OF THE REHABILITATION ACT OF 1973

A. The Rehabilitation Act Does Not Provide The Unequivocal Statutory Statement Required To Accomplish A Waiver Of Federal Sovereign Immunity Against Awards Of Money Damages For Violations Of Section 504(a)

1. The United States can be sued only on matters for which Congress has waived sovereign immunity. *United States* v. *Sherwood*, 312 U.S. 584, 586 (1941); *United States* v. *Eckford*, 73 U.S. (6 Wall.) 484, 490 (1867) ("no action of any kind could be sustained against the government for any supposed debt, unless by its own consent"); *United States* v. *Clarke*, 33 U.S. (8 Pet.) 436, 444 (1834). Executive officials cannot waive federal sovereign immunity; any waiver must be based on "affirmative statutory authority" from Congress. *United States* v. *United States Fidelity & Guaranty Co.*, 309 U.S. 506, 513-514 (1940). Moreover, the legislative history of a statute may not supply the requisite waiver; "the 'unequivocal expression' of elimination of sovereign immunity that [the Court] insist[s] upon is an expression in statutory text." *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 37 (1992). Nor can a waiver of sovereign immunity be found in the general purposes of a statute, *United States* v. *Testan*, 424 U.S. 392, 399-400 (1976), or in

policy considerations underlying the statute, *Library of Congress* v. *Shaw*, 478 U.S. 310, 320-321 (1986).[4]

Like a waiver of immunity itself, which must be "unequivocally expressed," *United States* v. *Mitchell*, 445 U.S. 535, 538 (1980), a waiver of immunity to a particular remedy also "cannot be implied but must be unequivocally expressed." *United States* v. *King*, 395 U.S. 1, 4 (1969); see *United States* v. *Sherwood*, 312 U.S. at 590-591 (statutory language should be construed conservatively and not to extend a waiver beyond the limits marked by the government's consent to suit). The "limitations and conditions upon which the Government consents to be sued must be strictly observed and exceptions thereto are not to be implied." *Lehman* v. *Nakshian*, 453 U.S. 156, 161 (1981), quoting *Soriano* v. *United States*, 352 U.S. 270, 276 (1957); *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (where sovereign immunity has been waived, such waiver must be strictly construed in the government's favor and may not be enlarged to permit actions beyond what the statute requires); see, *e.g.*, *Library of Congress* v. *Shaw*, *supra* (waiver of

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[4] In asserting that the scope of a federal sovereign immunity waiver can be ascertained by reference to the underlying congressional policy (see Pet. Br. 11-12 & n.7, 24; *id.* at 28), petitioner relies on cases involving "sue and be sued" clauses of government corporations or similar entities. See *Franchise Tax Bd.* v. *United State Postal Serv.*, 467 U.S. 512, 517-521 (1984); *Keifer & Keifer* v. *Reconstruction Fin. Corp.*, 306 U.S. 381, 389 (1939). But as *Nordic Village* made clear, cases dealing with "sue and be sued" clauses "do not * * * eradicate the traditional principle" that, in other types of cases, the government's consent to suit must be strictly construed and not enlarged beyond what the statutory language requires. 503 U.S. at 34.

government's immunity from suits under Title VII of the Civil Rights Act of 1964 and awards of attorneys' fees did not extend to awards of interest); *Lehman* v. *Nakshian*, *supra* (waiver of immunity from suit under the Age Discrimination in Employment Act of 1967 did not waive immunity from jury trial).

The Court recently reaffirmed that, to permit the recovery of money damages from the government, a waiver of immunity must unambiguously extend to monetary claims. *United States* v. *Nordic Village, Inc.*, 503 U.S. at 33-34, 39. If a statute waiving immunity can plausibly be read not to impose monetary liability on the federal government, money damages are not authorized. *Id.* at 34, 37; see also *United States* v. *Williams*, 115 S. Ct. 1611, 1616 (1995) (any ambiguities in waiver must be resolved in favor of sovereign immunity).

2. The court of appeals correctly ruled in the instant case and in *Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994) (J.A. 21-27), that Congress did not provide the requisite unequivocal waiver of the federal government's sovereign immunity against money damage awards so as to authorize recovery of damages against the government for violations of Section 504(a) of the Rehabilitation Act.

a. As originally enacted in 1973, Section 504 of the Rehabilitation Act provided that

> [n]o otherwise qualified handicapped individual in the United States * * * shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Rehabilitation Act of 1973, Pub. L. No. 93-112, § 504, 87 Stat. 394. The text of this initial version of Section 504 was modeled on the text of Title VI of the Civil Rights Act of 1964, Pub. L. No. 88-352, § 601, 78 Stat. 252, which prohibits discrimination on the basis of race, color, or national origin "under any program or activity receiving Federal financial assistance." 42 U.S.C. 2000d. See *Alexander* v. *Choate*, 469 U.S. 287, 293 n.7 (1985). The text of Section 504 as originally enacted also mirrored the language of Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex "under any education program or activity receiving Federal financial assistance." 20 U.S.C. 1681(a).[5] Title IX had itself been modeled on Title VI and was expected to be interpreted consistently with Title VI. See *North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 514 (1982).

b. The relevant text of Section 504 remained as originally enacted until 1978.[6] In that year, Congress amended Section 504 so that it was no longer limited to prohibiting handicap discrimination by recipients of federal funds. Congress extended the nondiscrimination provision of Section 504 to prohibit handicap discrimination "under any program or activity

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[5] See S. Rep. No. 1297, 93d Cong., 2d Sess. 39-40 (1974) ("Section 504 was patterned after, and is almost identical to, the anti-discrimination language of section 601 of the Civil Rights Act of 1964, 42 U.S.C. 2000d-1 * * *, and section 901 of the Education Amendments of 1972, 42 U.S.C. 1683").

[6] In 1974, Congress amended other aspects of the Rehabilitation Act not directly at issue here, most notably the definition of "handicapped individual" to clarify that the definition did not relate merely to an individual's employability. See Rehabilitation Act Amendments of 1974, Pub. L. No. 93-516, § 111(a), 88 Stat. 1619, codified at 29 U.S.C. 706(6) (1976).

conducted by any Executive agency or by the United States Postal Service." Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978 (RCSDDA), Pub. L. No. 95-602, § 119, 92 Stat. 2982, codified at 29 U.S.C. 794 (1982).[7] The amendment directed the federal executive agencies to promulgate implementing regulations. *Ibid.*

The 1978 amendment of Section 504 clearly did not, by its terms, waive the federal government's sovereign immunity against awards of money damages for violations of its statutory obligation not to discriminate on the basis of handicap. None of the materials cited by petitioner (Pet. Br. 17) indicates otherwise. The statements by legislators in 1978 on which petitioner relies addressed the general obligation of nondiscrimination imposed on federal executive agencies, but "uttered not a word about relinquishing the government's immunity from damages." *Dorsey* v. *United States Dep't of Labor*, 41 F.3d at 1555 (J.A. 27).

Petitioner nevertheless argues that the 1978 amendment to Section 504 reflected a congressional intention that all remedies available against private defendants under Section 504, including money damages, would also be available against federal executive agencies. Petitioner premises this argument on his assertions (Pet. Br. 10, 14-15, 19, 20-21, 26, 29, 31, 36) that Congress intended to place federal defendants on an "equal footing" with all other defendants, treating federal defendants "identically" to non-federal defendants. Petitioner claims that Congress nowhere expressed any intention to treat federal agencies differently from non-federal defendants, against whom monetary damages can be recovered under Section 504(a).

[7] "Executive agency," is defined in 5 U.S.C. 101, 103, 104, and 105 to include federal executive agencies, including the Department of Transportation, as well as government corporations and independent establishments in the executive branch.

Petitioner's argument for identical treatment of federal defendants and non-federal defendants in Section 504(a) cases is unpersuasive. Contrary to petitioner's premise that Congress intended identical treatment for federal and non-federal defendants, Congress expressly revealed its intention to treat federal executive agencies differently from other Section 504(a) defendants for purposes of remedies. Thus, at the same time that Congress made "any program or activity conducted by any Executive Agency" subject to Section 504, it also added Section 505 to the Act explicitly to address remedies. With regard to remedies for Section 504 violations, Section 505(a)(2) provides:

> The remedies, procedures, and rights set forth in Title VI of the Civil Rights Act of 1964 shall be available to any person aggrieved by any act or failure to act *by any recipient of Federal assistance or Federal provider of such assistance under section 504 of this Act.*

RCSDDA § 120(a), 92 Stat. 2983, codified at 29 U.S.C. 794a(a)(2) (emphasis added). Congress thus provided that Title VI remedies should be available against recipients of federal financial assistance and the federal providers of such assistance. The statute does not, however, make those remedies available to persons discriminated against under activities that are themselves "conducted by any Executive agency." By extending the remedial provision of Section

505(a)(2) only to the funding activities of federal agencies, while extending the nondiscrimination obligation of Section 504 to programs and activities conducted by such agencies, Congress explicitly treated federal executive agencies differently from federal fund recipients for remedial purposes.[8] Regardless of the remedies available against federal fund recipients for violations of Section 504, the 1978 amendment to Section 504 and the addition of Section 505 did not waive federal sovereign immunity against money damages for violations of Section 504(a) committed by federal executive agencies themselves.[9]

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[8] It would have been odd for Congress to have provided that Title VI remedies applied in Section 504 cases involving discrimination by executive agencies because Title VI does not prohibit discrimination in programs or activities conducted by executive agencies. To the extent that Title VI (and other federal statutes placing obligations on federal fund recipients, such as Section 504, as initially enacted, Title IX, and the Age Discrimination Act of 1975) applies to federal agencies as providers of funds to non-federal programs or activities that discriminate, federal executive agencies may, according to some courts, be subject to injunctive relief and attorneys' fees. The remedy in such cases is "one directed primarily toward the fund recipient, not the funding agency." *Women's Equity Action League* v. *Cavazos*, 906 F.2d 742, 748 & n.6, 749 & n.9, 750 (D.C. Cir. 1990) (Ginsburg, R., J.) (refusing to find implied cause of action for suit seeking continued federal court supervision of federal officials charged with monitoring recipients of federal funds under Title VI, Section 504(a), and other federal statutes, but noting that remedies may be available against federal funding agency in recipient-specific cases). Courts are divided about whether to permit actions for injunctions against the federal funding agency in such circumstances. See *id.* at 749 (citing cases).

[9] Contrary to petitioner's claim (Pet. Br. 30-31), Congress's coverage of the activities of federal executive agencies

Congress's inclusion of federal agencies in Section 505(a)(2) only in their capacity as funding agencies was not a drafting error, as the Ninth Circuit has suggested. See *Doe* v. *Attorney General of United States*, 941 F.2d 780, 787 n.13 (1991). In Section 505(a)(1), which immediately precedes, and was enacted contemporaneously with, Section 505(a)(2), Congress expressly waived sovereign immunity against certain remedies for Rehabilitation Act violations by federal defendants. Section 505(a)(1) specifies the remedies available for violations of Section 501, which prohibits disability discrimination in employment decisions by the federal government. Section 505(a)(1) provides in relevant part:

> The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16) [the provisions of Title VII that govern employment by the federal government], including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)) [the provisions of Title VII detailing remedies available in a civil action against the government for employment discrimination], shall be available, with respect to any complaint under section 501 of this Act, to any employee or applicant for employ-

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in Section 504 was not sufficient under *Fitzpatrick* v. *Bitzer*, 427 U.S. 445 (1976), to waive the government's immunity against damages for violation of the Act. In *Fitzpatrick*, there was an explicit remedial provision of the statute making back pay available against a "respondent" and it was clear that States were respondents under the Act. Here Congress did not include in its new remedial provision (Section 505) any reference to cases involving discrimination in programs or activities conducted (as opposed to funded) by federal executive agencies.

> ment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint.

RCSDDA § 120(a), 92 Stat. 2982, codified at 29 U.S.C. 794a(a)(1). Congress thus waived immunity with regard to the identified Title VII remedies for purposes of "any complaint under section 501."[10] If Congress had similarly intended to treat all defendants alike under Section 504 for purposes of remedy, it presumably would have used similar language in Section 505(a)(2) and made Title VI remedies available there with respect to "any complaint under section 504."[11]

Finally, Congress's addition of an attorneys' fees provision in the Rehabilitation Act in 1978 does not show that it waived the federal government's immunity against monetary damages for violations of Section 504(a). The attorneys' fees provision addresses

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[10] The remedies for Section 501 violations did not include compensatory damages in 1978. In 1991, however, Congress waived sovereign immunity against compensatory (but not punitive) damages in cases of intentional discrimination under Section 501. Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, 1073, codified at 42 U.S.C. 1981a(a)(2), (b)(1) and (2) (Supp. V 1993). See pages 24-25, *infra*.

[11] This case is similar to *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992). The Court there held that the fact that Congress treated three different categories of claims differently—waiving immunity against monetary relief in two of those categories but not in the third—made it all the more apparent that it intended not to waive immunity against monetary relief in the category that did not contain waiver language.

only fees, not the availability of money damages. It provides:

> In any action or proceeding to enforce or charge a violation of a provision of this title, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

RCSDDA § 120(a), 92 Stat. 2983, codified at 29 U.S.C. 794a(b). Petitioner contends (Br. 20-21) that, because Congress clearly expressed an intent in this section to treat the United States differently from other parties (by allowing all prevailing parties other than the United States to recover attorneys' fees), the Court should not distinguish among parties with regard to remedies under Section 504(a), where Congress did not express such an intention. As demonstrated above, however, Congress *did* express an intention to distinguish between parties with regard to remedies under Section 504. Congress limited Section 505(a)(2) to cases involving actions against recipients of federal assistance and the federal providers of the assistance, and did not include cases involving programs or activities conducted by federal executive agencies in the new remedial provision.[12]

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[12] The attorneys' fees provision states that the United States can be a prevailing party in actions under Title V of the Rehabilitation Act. That provision does not establish that Congress understood that the United States would be amenable to suits for damages based on Section 504(a) violations that occur in activities or programs conducted by federal executive agencies. There are at least three ways in which the United States can be a prevailing party in actions under Title V of the Act that do not involve suits for damages against the United

c. The 1986 amendments to the Rehabilitation Act also do not provide a waiver of federal sovereign immunity against actions for damages under Section 504(a). To the contrary, these amendments illustrate that Congress knew how to waive such immunity unequivocally when it wished to do so and that Congress did not do so with regard to actions for damages under Section 504(a).

Section 1003 of the 1986 Act was enacted in direct response to the decision by the Court in *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985), that Congress had not waived the sovereign immunity of the States against actions in federal court for money damages under Section 504. See S. Rep. No. 388, 99th Cong., 2d Sess. 27-28 (1986); H.R. Conf. Rep. No. 955, 99th Cong., 2d Sess. 78-79 (1986). In *Atascadero*, the Court held that "Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakably clear in the language of the statute."

States under Section 504(a): (1) The United States can be sued under Section 501, which prohibits disability discrimination in employment by the federal government. (2) The United States is authorized to bring actions against federal fund recipients related to its enforcement responsibilities under Section 504(a). See, *e.g.*, *United States* v. *Baylor Univ. Medical Ctr.*, 736 F.2d 1039, 1050 (5th Cir. 1984), cert. denied, 469 U.S. 1189 (1985). (3) The United States may be a defendant in cases where plaintiffs seek injunctive relief against non-federal programs funded by the United States that violate Section 504(a). See *Women's Equity Action League* v. *Cavazos*, 906 F.2d at 750 (Ginsburg, R., J.) (federal agency that provides funds to violator of Section 504(a) could be liable under that section, including for attorneys' fees).

473 U.S. at 242. The Court examined the text of the Rehabilitation Act and did not find such language.

Section 1003(a) of the Rehabilitation Act Amendments of 1986 provides, in relevant part:

> (1) A State shall not be immune under the Eleventh Amendment of the Constitution * * * from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973, title IX of the Education Amendments of 1972, the Age Discrimination Act of 1975, title VI of the Civil Rights Act of 1964, or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.
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> (2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

Pub. L. No. 99-506, 100 Stat. 1845, codified at 42 U.S.C. 2000d-7(a).

Relying upon the reference in Section 1003(a)(2) to "any public or private entity other than a State," petitioner argues that this text reflects the fact that federal executive agencies must be subject to the same remedies under Section 504(a) as are private entities, including monetary damages. See Pet. Br. 21-22 & n.20. Section 1003(a)(2), however, applies only to remedies available for violation of statutes referred to in Section 1003(a)(1), *i.e.*, statutes that prohibit discrimination by recipients of federal financial assistance, including Section 504, Title VI, Title IX,

and the Age Discrimination Act of 1975. It is thus likely that the "public entities" to which Congress referred in Section 1003(a)(2) are not federal entities, but are the non-federal public entities receiving federal financial assistance that are covered by all of those statutes—*i.e.*, local school districts, municipal hospitals, local governmental units.

This reading of Section 1003(a)(2) is supported by the circumstances surrounding the enactment of that provision. With the Court's ruling in *Atascadero* as its guide, Congress in Section 1003(a)(1) and (2) met the unequivocal-statement standard for waiving the States' sovereign immunity against suit for specific remedies. If Congress had similarly intended to effectuate such a waiver for the federal government it would have used similarly unequivocal language. It would have been odd for Congress, taking careful stock of the state of sovereign immunity law, to "drop coy hints but stop short of making its intention manifest." *Dellmuth* v. *Muth*, 491 U.S. 223, 230-231 (1989).

d. Petitioner errs in claiming (Pet. Br. 23-24) that the 1992 amendments to the Rehabilitation Act constitute a waiver of federal sovereign immunity against money damages for violations of Section 504(a).[13] In those amendments, Congress made no

[13] Congress also amended Section 504 in 1988. Congress acted at that time to overturn the Court's ruling in *Grove City College* v. *Bell*, 465 U.S. 555 (1984), which had construed narrowly the phrase "program or activity" as used in Title IX, as well as in Section 504, Title VI, and the Age Discrimination Act of 1975. Civil Rights Restoration Act of 1987, Pub. L. No. 100-259, §§ 2, 4, 102 Stat. 28, 29-30 (1988); see S. Rep. No. 64, 100th Cong., 1st Sess. 2-7 (1987). The 1988 amendments resulted in

change in Section 505 and, with regard to Section 504(a), simply replaced the term "handicap" with the term "disability" and added a subsection regarding standards to be applied in employment cases. See Pub. L. No. 102-569, §§ 102(p)(32), 506, 106 Stat. 4360, 4428.

Petitioner relies on the 1992 statement of one member of Congress, Senator Jeffords, in attempting to establish Congress's intention in amending Section 504 some 14 years earlier. In his statement, Senator Jeffords expressed his agreement with the Ninth Circuit's decision in *Doe* v. *Attorney General of United States*, *supra*, and his belief that Congress had intended in 1978 to create a private cause of action against federal executive agencies. See Pet. Br. 24; 134 Cong. Rec. S16,608-S16,609 (daily ed. Oct. 5, 1992). However, petitioner does not cite any statement by Senator Jeffords or anyone else that identifies the requisite unequivocal statutory waiver of immunity against money damages.[14] In all events, "the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute." *Central Bank* v. *First Interstate Bank*, 114 S. Ct. 1439, 1452 (1994), quoting *Public Employees Retirement Sys.* v. *Betts*, 492 U.S. 158, 168 (1989). The Court also has previously rejected more contemporaneous, but similarly isolated, statements by Senator Jeffords

placing the general discrimination prohibition (previously Section 504) in Section 504(a).

[14] Senator Jeffords' statement in 1992 that there was no need to amend the Act because the 1978 language was sufficient to provide for a waiver (see Pet. Br. 24) takes no account of the Court's ruling in *Atascadero* and Congress's amendments in 1986 to waive the States' Eleventh Amendment immunity.

in connection with whether Section 504 waived State immunity. See *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. at 251 (Brennan, J., dissenting, joined by Marshall, Blackmun, and Stevens, JJ.).

e. The overall structure and history of the Rehabilitation Act support the court of appeals' refusal to find a waiver of immunity against claims of money damages for violations of Section 504 by federal executive agencies. This Court has already rejected the argument that the structure of the Act reflects a congressional intent that all Section 504(a) defendants be treated alike. In *Atascadero*, involving an earlier version of the same Act, the Court expressly ruled that Congress did not eliminate all legal distinctions among Section 504 defendants:

> [G]iven their constitutional role, the States are not like any other class of recipients of federal aid. A general authorization for suit in federal court is not the kind of unequivocal statutory language sufficient to abrogate the Eleventh Amendment. When Congress chooses to subject the States to federal jurisdiction, it must do so specifically.

473 U.S. at 246. That statement is equally applicable to asserted waivers of the federal government's sovereign immunity. See *United States* v. *Nordic Village, Inc.*, 503 U.S. at 34. As in *Atascadero*, in order to agree with petitioner in this case, the Court would have to modify its requirement that waivers of sovereign immunity against money damages be unequivocally expressed.

Perhaps the strongest evidence of congressional intent in this case is the fact that Congress has unequivocally twice waived federal sovereign immunity against certain monetary relief for violations of

Section 501 of the Rehabilitation Act. As discussed above, in its 1978 amendments, Congress did so by expressly authorizing certain Title VII remedies against the government for employment discrimination based on disability. Back pay was among those Title VII remedies made available in 1978. See 42 U.S.C. 2000e-5(g)(1) (Supp. V 1993). Before 1991, however, Title VII was not interpreted as providing for awards of compensatory damages against the government. In the Civil Rights Act of 1991, Pub. L. No. 102-166, § 102, 105 Stat. 1072, Congress explicitly authorized such damages as a remedy for intentional employment discrimination by the federal government in violation of Section 501. 42 U.S.C. 1981a(a)(2) (Supp. V 1993).[15] In that legislation, Congress thus waived, in the required unmistakable language, the government's immunity against actions seeking compensatory damages for violations of Section 501. Congress has taken no such action with regard to remedies in Section 504(a) cases involving programs or activities conducted by federal executive agencies.

B. The Doctrine That Waivers Of Federal Sovereign Immunity Against Money Damages Must Be Unequivocally Expressed By Congress Was Not Abolished By The Court's Ruling In *Franklin* v. *Gwinnett County Public Schools*

Petitioner urges the Court to find a waiver in this case by contending that the Court abandoned its long-standing unequivocal-statement rule when it held in

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[15] Because back pay was already authorized, the 1991 statute specifically excludes from compensatory damages "backpay, interest on backpay, or any other type of relief authorized under [42 U.S.C. 2000e-5(g)]." 42 U.S.C. 1981a(b)(2) (Supp. V 1993).

Franklin v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), that, "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute." 503 U.S. at 70-71. Petitioner argues that, under *Franklin*, there is a "presumption that unless Congress expressly provides to the contrary, it intends 'all appropriate remedies' to be available, including money damages, when it creates a cause of action to vindicate federal statutory rights." Pet. Br. 10; see also *id.* at 18-19. Petitioner claims that this presumption applies even in suits for money damages against the federal government and that Congress adopted the all-remedies rule described in *Franklin* when it added federal executive agencies to Section 504 in 1978 (see *id.* at 12, 18-19, 20), when it once again amended the Act in 1986 (see *id.* at 23), and when it again amended the Act in 1992 (see *ibid.*).[16]

In *Franklin*, the suit was based on an implied private right of action against non-federal defendants

[16] The lower court opinions prior to 1986 allowing damages under Section 504(a) (Pet. Br. 22 n.19) do not support the inference that Congress's awareness of these opinions when it reenacted Section 504 evidences an intent to permit damages against federal defendants. Those cases did not involve discrimination in programs or activities conducted by federal executive agencies and did not address any federal sovereign immunity issues. Moreover, one of those cases, *Miener* v. *Missouri*, 673 F.2d 969, 977-978 (8th Cir.), cert. denied, 459 U.S. 909, 916 (1982), involved a State claiming sovereign immunity. The *Miener* court recognized that sovereign immunity is relevant with regard to remedies under Section 504; the court found the State immune despite the fact that it ruled that other recipients of federal funds were liable for damages.

under Title IX. The Court held that monetary damages were available as a remedy. The Court invoked "the traditional presumption in favor of all available remedies" and found no indication of any congressional intent to limit the remedies available to a plaintiff in such a case. 503 U.S. at 72.

Petitioner contends that, once it is established that a cause of action against the government exists under Section 504(a), a damages remedy "follows" under *Franklin*.[17] Pet. Br. 19 n.16. All available remedies

[17] Petitioner asserts a private right of action against the federal government under Section 504(a). Prior to 1978, four courts of appeals had held that Section 504 could be enforced through a private right of action. See Pet. Br. 17-18 & n.14; see also *id.* at 15 & n.12. None of those cases, however, involved suits under Section 504 alleging discrimination in a program or activity conducted by a federal executive agency. The First Circuit has held that actions such as petitioner's are effectively a request for review under the Administrative Procedure Act (APA), 5 U.S.C. 701 *et seq.*, and not an exercise of an implied private right of action under Section 504. *Cousins* v. *Secretary of United States Dep't of Transp.*, 880 F.2d 603, 605 (1989) (en banc) (Breyer, J.); accord *Clark* v. *Skinner*, 937 F.2d 123, 125-126 (4th Cir. 1991).

The D.C. Circuit did not address the issue of the source of petitioner's cause of action in its summary affirmance in this case. Pet. App. 1a-2a. In *Dorsey*, the D.C. Circuit also found no need to resolve the cause of action issue because, "[e]ven if there is an implied right of action for damages under Title VI, and thus under § 504, it cannot exist as against the federal government." 41 F.3d at 1554-1555 (J.A. 26). The fact "[t]hat damages may be recovered against private parties does not * * * lead to the conclusion that damages may also be recovered against the government. When it comes to monetary relief, sovereign immunity puts the federal government on a different footing [from] private parties." *Id.* at 1555 (J.A. 26-27). In our view, resolution of the source of the cause of action, be it under Section 504(a) directly or the APA, would

do not, however, naturally follow in a case where federal sovereign immunity is invoked.

Where a cause of action is authorized against the federal government, the available remedies are not those that are "appropriate," but only those for which sovereign immunity has been expressly waived. See *United States* v. *Nordic Village, Inc.*, 503 U.S. at 33-37. Subjecting a governmental entity to the substantive or procedural requirements of a statute does not necessarily mean that sovereign immunity has been waived with respect to claims for damages. See, *e.g.*, *United States Dep't of Energy* v. *Ohio*, 503 U.S. 607, 628 (1992) (federal agency subject to procedural requirements of certain federal environmental statutes, but immune from actions for monetary relief); cf. *Edelman* v. *Jordan*, 415 U.S. 651 (1974) (State's officers can be subject to prospective injunctive relief even though State is immune from damages).

Franklin contains no discussion of sovereign immunity concerns. The Court did not give any hint that its decision was meant to eviscerate the principles of sovereign immunity against monetary damages rearticulated by the Court just one day earlier in *Nordic Village*. It is implausible that, on the day after it decided *Nordic Village*, the Court would *sub silentio* overrule that decision in *Franklin*.

Petitioner errs in suggesting (Pet. Br. 14, 19 n.17) that the government's position is inconsistent with the ruling in *Consolidated Rail Corp.* v. *Darrone*,

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not alter the outcome of this case. The waiver of federal sovereign immunity in the APA is limited to an action "seeking relief other than money damages." 5 U.S.C. 702.

465 U.S. 624 (1984), that back pay is available to a private plaintiff in an action under Section 504(a) against a non-federal defendant. Petitioner argues (Pet. Br. 14 & n.11, 19 n.17) that there must be a waiver of federal sovereign immunity under Section 504(a) for damages against federal executive agencies because, in *Darrone*, the Court stated that "Congress clearly intended to make backpay available to victims of discrimination by the Federal Government." 465 U.S. at 631 n.10, citing S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978). Petitioner, however, misconstrues the import of the *Darrone* Court's citation to the Senate Report's reference to the availability of back pay. The report discusses the availability of back pay against the federal government under Section 501, where there is an express waiver of sovereign immunity against such a remedy, not the availability of such relief against the government under Section 504. See S. Rep. No. 890, *supra*, at 19.[18]

Petitioner contends that *Franklin* should control here because the authorities on which the Court relied there involved claims against federal officers. See Pet. Br. 19, 23, 32-34. Those authorities, however, do not establish the applicability of *Franklin* to suits for monetary damages against the United States. In

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[18] The brief of one of petitioner's *amici* also appears to confuse Section 504 and Section 501. American Diabetes Association Amicus Br. 12-13. The brief refers to a settlement entered into by the Department of Treasury and an individual based on allegations of disability discrimination in violation of the Rehabilitation Act. It points to the fact that the settlement included payment by the government of compensatory damages. That case was brought under Section 501 of the Act, not under Section 504, however, and related to adverse employment action by the Department.

Bell v. *Hood*, 327 U.S. 678 (1946), the Court held that injunctive relief may be available against the federal government for constitutional violations, but reserved the question of the availability of damages.[19] In *Dooley* v. *United States*, 182 U.S. 222 (1901), the principal issues concerned whether the Court of Claims had jurisdiction over a cause of action for recovery of previously paid customs duties and whether the action sounded in tort. *Id.* at 224. In holding that the Court of Claims had jurisdiction, the Court stated that "a liability created by statute without a remedy may be enforced by a common-law action." *Id.* at 229. Here petitioner is not left without any remedy. In *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524 (1838), Congress had specifically authorized government payment to mail carriers; the Court held that the court of appeals had jurisdiction to issue a writ of mandamus for that ministerial act. *Id.* at 609, 626. The Court explicitly acknowledged that "[t]he United States could not, of course, be sued, or the claims in any way enforced against the United States, without [its] consent obtained through an act of congress." *Id.* at 611. It found that a special act of Congress "on its face" provided the necessary consent. *Ibid.*

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[19] In *Bell*, it was unclear whether petitioners were seeking damages against federal officials in their personal capacities, or the federal government in its official capacity. 327 U.S. at 684. This Court settled the matter in *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971). Relying on *Bell*, the Court held that damages were available against federal officials in their personal capacities for violations of clearly established constitutional rights. In *FDIC* v. *Meyer*, 114 S. Ct. 996 (1994), the Court held that there is no *Bivens* action for damages against federal agencies.

In cases where there has been an apparent conflict between the principle of sovereign immunity and other seemingly well-established rules, the Court has uniformly ruled that the latter must yield to the former, not the other way around as petitioner suggests (Pet. Br. 34-38). For example, in *Block* v. *North Dakota ex rel. Bd. of Univ. & Sch. Lands*, 461 U.S. 273 (1983), a State sought to avoid the statute of limitations in an action it brought against the United States involving disputed riparian rights. The State invoked "the well-known canon of statutory construction" that statutes of limitations do not apply to States, absent some explicit indication. *Id.* at 288. This Court ruled, however, that the federal government's sovereign immunity must take precedence. *Ibid.*

The same reasoning applies in the instant case. The traditional rule of remedies enunciated in *Franklin* bears a strong resemblance to the canon of construction upon which the State relied in *Block*—both are judicially crafted rules with an established pedigree. The Court in *Block* did not find that a sufficient reason to cast aside longstanding principles requiring strict application of waivers of sovereign immunity. To the extent that this case could similarly be viewed as involving competing principles, the same conclusion is applicable here.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Rehabilitation Act of 1973, as amended and codified at 29 U.S.C. 791 *et seq.*, provides, in relevant part:

§ 791. Employment of individuals with disabilities

* * * * *

(b) Federal agencies; affirmative action program plans

Each department, agency, and instrumentality (including the United States Postal Service and the Postal Rate Commission) in the executive branch shall, within one hundred and eighty days after September 26, 1973, submit to the Commission and to the Committee an affirmative action program plan for the hiring, placement, and advancement of individuals with disabilities in such department, agency, or instrumentality. Such plan shall include a description of the extent to which and methods whereby the special needs of employees who are individuals with disabilities are being met. Such plan shall be updated annually, and shall be reviewed annually and approved by the Commission, if the Commission determines, after consultation with the Committee, that such plan provides sufficient assurances, procedures and commitments to provide adequate hiring, placement, and advancement opportunities for individuals with disabilities.

* * * * *

§ 794a. Remedies and attorney fees

(a)(1) The remedies, procedures, and rights set forth in section 717 of the Civil Rights Act of 1964 (42 U.S.C. 2000e-16), including the application of sections 706(f) through 706(k) (42 U.S.C. 2000e-5(f) through (k)), shall be available, with respect to any complaint under section 791 of this title, to any employee or applicant for employment aggrieved by the final disposition of such complaint, or by the failure to take final action on such complaint. In fashioning an equitable or affirmative action remedy under such section, a court may take into account the reasonableness of the cost of any necessary work place accommodation, and the availability of alternatives therefor or other appropriate relief in order to achieve an equitable and appropriate remedy.

(2) The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.] shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section 794 of this title.

(b) In any action or proceeding to enforce or charge a violation of a provision of this subchapter, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

2. Section 1003(a) of the Rehabilitation Act Amendments of 1986, as codified at 42 U.S.C. 2000d-7(a), provides:

§ 2000d-7. Civil rights remedies equalization

(a) General provision

(1) A State shall not be immune under the Eleventh Amendment of the Constitution of the United States from suit in Federal court for a violation of section 504 of the Rehabilitation Act of 1973 [29 U.S.C. 794], title IX of the Education Amendments of 1972 [20 U.S.C.A. 1681 et seq.], the Age Discrimination Act of 1975 [42 U.S.C.A. 6101 et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or the provisions of any other Federal statute prohibiting discrimination by recipients of Federal financial assistance.

(2) In a suit against a State for a violation of a statute referred to in paragraph (1), remedies (including remedies both at law and in equity) are available for such a violation to the same extent as such remedies are available for such a violation in the suit against any public or private entity other than a State.

3. Section 601 of the Civil Rights Act of 1964, as codified at 42 U.S.C. 2000d, provides:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

4. Section 901 of the Education Amendments of 1972, as codified at 20 U.S.C. 1681, provides, in relevant part:

§ 1681. Sex

(a) Prohibition against discrimination; exceptions

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance, * * *

* * * * *

5. Section 303 of the Age Discrimination Act of 1975, as codified at 42 U.S.C. 6102, provides, in relevant part:

§ 6102. Prohibition of discrimination

Pursuant to regulations prescribed under section 6103 of this title, and except as provided by section 6103(b) and section 6103(c) of this title, no person in the United States shall, on the basis of age, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any program or activity receiving Federal financial assistance.

6. Section 102 of the the Civil Rights Act of 1991, as codified at 42 U.S.C. 1981a, provides, in relevant part:

§ 1981a. Damages in cases of intentional discrimination in employment

(a) Right of recovery

(1) Civil rights

In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act [42 U.S.C. 2000e-2, 2000e-3, 2000e-16], and provided that the complaining party cannot recover under section 1981 of this title, the

complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in section 706 or 717 of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5, 2000e-16] (as provided in section 107(a) of the Americans with Disabilities Act of 1990 (42 U.S.C. 12117(a)), and section 794a(a)(1) of title 29, respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under section 791 of title 29 and the regulations implementing section 791 of title 29, or who violated the requirements of section 791 of title 29 or the regulations implementing section 791 of title 29 concerning the provision of a reasonable accommodation, or section 102 of the Americans with Disabilities Act of 1990 (42 U.S.C. 12112), or committed a violation of section 102(b)(5) of the Act, against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.

(3) Reasonable accommodation and good faith effort

In cases where a discriminatory practice involves the provision of a reasonable accommodation pursuant

to section 102(b)(5) of the Americans with Disabilities Act of 1990 [42 U.S.C. 12112(b)(5)] or regulations implementing section 791 of title 29, damages may not be awarded under this section where the covered entity demonstrates good faith efforts, in consultation with the person with the disability who has informed the covered entity that accommodation is needed, to identify and make a reasonable accommodation that would provide such individual with an equally effective opportunity and would not cause an undue hardship on the operation of the business.

(b) Compensatory and punitive damages

(1) Determination of punitive damages

A complaining party may recover punitive damages under this section against a respondent (other than a government, government agency or political subdivision) if the complaining party demonstrates that the respondent engaged in a discriminatory practice or discriminatory practices with malice or with reckless indifference to the federally protected rights of an aggrieved individual.

(2) Exclusions from compensatory damages

Compensatory damages awarded under this section shall not include backpay, interest on backpay, or any other type of relief authorized under section 706(g) of the Civil Rights Act of 1964 [42 U.S.C. 2000e-5(g)].

* * * * *

Supreme Court, U.S.
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No. 95-365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

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FEDERICO F. PEÑA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the
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REPLY BRIEF FOR PETITIONER

The government concedes that it violated the Rehabilitation Act ("the Act") when it excluded Griff Lane from the Merchant Marine Academy. Brief for the Respondents ("Govt Br.") 5 n.1. It also concedes that this violation caused Lane $75,000 in damages, including lost future earnings and out-of-pocket expenses. Pet. App. 9a. It furthermore concedes that Congress has waived the federal government's sovereign immunity so that Lane could bring suit challenging the government's violation, and it has not disputed Lane's contention that the scope of that waiver is entitled to a "liberal construction" in order to accomplish the "beneficent purposes" of the Act. *See* Brief for Petitioner ("Lane Br.") 37-38 (citing *United States* v. *Williams*, 115 S. Ct. 1611, 1623-24 (Rehnquist, C.J., dissenting)).

But the government contends that Congress did not intend Griff Lane to be made whole for its conceded violation. Instead, according to the government, even though Congress intended the substantive nondiscrimination provision of Section 504 to apply equally to *all* governmental and private entities, Congress contemplated that the remedies would differ depending on which entity violated that provision.

Specifically, the government's theory is that if a private party receiving federal financial assistance violates the Act, Congress intended that all appropriate relief should be granted to make the victim whole, including declaratory and injunctive relief, back pay, attorneys' fees, and money damages. The government says the same is true if the violator is a State or local government. And it says the same is still true if the Federal government violates the Act with regard to employment. It even appears to concede that Congress intended that federal agencies be suable under Section 504 and that money damages would be available in those suits, but *only* when the agencies are merely funding another entity that discriminates, not when the agencies directly discriminate themselves. Indeed, when agencies directly discriminate in violation of the Rehabilitation Act, and if the violation is not against a federal employee, then the government argues that Congress intended all remedies except money damages to be available, even if denial of those damages would effectively deprive the victim of any remedy at all.

In its brief, the government does not even attempt to offer a plausible reason why Congress would intend such a crazy-quilt result. Neither does it suggest any basis for supposing that sovereign immunity concerns would have caused Congress to legislate such a result, *i.e.*, to authorize suit against the Federal government, to authorize the intrusiveness of injunctive relief against the government (relief which the government did not appeal in this case), to authorize monetary relief in the

form of back pay and attorneys' fees, and to authorize money damages against itself in the case of employment-related disability discrimination, or in the case of its funding of non-federal entities that discriminate, but then to deny money damages to people like Griff Lane.

Instead of pointing to anything in the history, purposes, or policy of the statute indicating that Congress intended such a result, the government considers each of the four key statutory provisions in a vacuum (the original 1973 Section 504, the 1978 Amendments, the 1986 Amendments, and the 1992 Amendments), offers a strained interpretation of each, ignores the implications of its interpretation, ignores how the four enactments fit together, and ignores what those enactments were intended to do. As a result, as we will show, the government's approach is not the "common sense inquiry" this Court requires, and it produces an implausible interpretation of the statute that the Court should not accept. *See United States* v. *Williams*, 115 S. Ct. at 1618.

1. At the outset, the government contends that the requisite waiver of sovereign immunity in this case cannot be based on "the general purposes of [the] statute" or on "policy considerations underlying the statute." Instead, it must be based on "affirmative statutory authority." Govt Br. 10-11. In fact, our case *is* squarely based on "affirmative statutory authority." And this Court has made clear that purpose and policy are important indicia of the meaning of that authority. *See* Lane Br. 11-12.

2. The government next implies that our statutory-authority argument is merely "that Congress nowhere expressed any intention to treat Federal agencies differently from non-federal defendants, against whom monetary damages can be recovered under Section 504(a)." Govt Br. 15. In fact, our argument is that Congress *repeatedly* and *affirmatively* expressed its intention: (1) that federal agencies should be subject to

the same duties and the same remedies as non-federal defendants; and (2) that those same remedies should include damages.

a. Thus, in the 1978 Amendments Congress expressly added federal agencies as defendants subject to Section 504's nondiscrimination requirement, and did so at a time when it was quite clear that the non-federal defendants already covered by that requirement were subject to a private right of action for damages. *See* Lane Br. 15-16. It is undisputed from the legislative history that Congress' purpose in adding federal agencies to the statute was to equalize their responsibility with that of non-federal defendants. *See* Lane Br. 19-20.

b. Similarly, in the 1986 Amendments, in reaction to this Court's decision in *Atascadero*,[1] Congress expressly added States as defendants subject to the Act. And in doing so, it provided that States would be subject to the same remedies under Section 504 -- "both at law and in equity" -- as those available against "any public or private entity." This Amendment not only made clear that all Section 504 defendants, both "public" and "private," were to be treated alike for purposes of remedies, but also, as this Court confirmed in *Franklin*,[2] the Amendment made clear that those remedies included damages. And significantly, as *Franklin* also demonstrates, inasmuch as the 1986 Amendments were sufficiently clear to abrogate the States' sovereign immunity from damages, 503 U.S. at 72-73, they were necessarily equally sufficient to confirm the waiver of immunity from damages for all other "public entities" subject to the Act, including the Federal government.

3. The government's answer to these clear expressions of Congress' intent is to offer the kind of "strained," "technical," "formalis[tic]" reading of the

[1] *Atascadero State Hosp.* v. *Scanlon*, 473 U.S. 234 (1985).

[2] *Franklin* v. *Gwinett County Pub. Schs.*, 503 U.S. 60 (1992).

statute the Court found inappropriate in *Williams*, 115 S. Ct. at 1618.

a. Thus, with regard to the 1978 Amendments, the government says first that "by [their] terms" those Amendments "did not * * * waive the federal government's sovereign immunity against awards of money damages for violations of its statutory obligation not to discriminate on the basis of handicap." Govt Br. 14. It is true that they did not do so "by [their] terms." But neither did the 1986 Amendments do so with regard to abrogating the States' immunity from damages for violations of its statutory obligation. *See* pp. 16-17, *infra*. The test, however, is whether Congress' intent is clear, not whether it has used a particular phrase or term. *See* Lane Br. 11-12.

b. The government says that Congress' intent is not clear because another provision of the 1978 Amendments -- Section 505(a)(2) -- states that Title VI remedies will be available for violations of the Act[3] "by any recipient of Federal assistance or Federal provider of such assistance," and that Congress thereby intended that those remedies would *not* be available against a Federal agency when it violates Section 504. In other words, the government argues that because Section 504 prohibits discrimination by federal recipients and "Executive agenc[ies]," while Section 505(a)(2) provides remedies against federal recipients and "Federal provider[s]," Congress intended a disconnect between the two sections, *i.e.*, that it deliberately provided that there should be *no remedies* for discrimination by executive agencies. There are at least three reasons why this construction of the statute is implausible.

First, as the Ninth Circuit explained in *Doe*,[4] the apparent "incongruity" between the two sections is ex-

[3] The government does not dispute that Title VI remedies include money damages. *See* Lane Br. 15-16.

[4] *Doe* v. *Attorney General*, 941 F.2d 780 (9th Cir. 1991).

plained by the fact that the amendment to Section 504 adding the government as a defendant originated in the House; the amendments to Section 505 defining remedies originated in the Senate; and the Conference Report did not adapt the former's language to exactly coincide with the latter's. 941 F.2d at 780 n.13. *See* H.R. Conf. Rep. No. 1780, 95th Cong., 2d Sess. 92-93 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7375, 7403-04. But this happenstance cannot reasonably be read to mean that the same Congress that both amended Section 504 to prohibit federal-agency discrimination, and in Section 505 provided remedies for violations of Section 504, intended *no remedies* for the newly-enacted application of Section 504 to federal agencies.[5] Indeed, if the use of "Federal provider" in Section 505(a)(2) were read to mean that no remedy was intended against executive agencies, then Section 505(b), enacted at the same time as the other 1978 Amendments, would make no sense. Section 505(b) authorizes attorneys' fees "[i]n *any* action" that "charge[s] a violation" of Section 504 (emphasis supplied). Section 504 undeniably applies to executive agencies. However, by the government's reading of Section 505(a)(2), Congress intentionally provided no action to "charge a violation" of Section 504 by any executive agency. This is implausible.

Second, if the government were correct that "Federal provider" should be read not to include or be interchangeable with "Executive agency," it is not clear what violation is to be charged against those "providers" for purposes of Section 505(b). The government suggests in its brief that "the remedial provision of Section 505(a)(2)" extends "only to the funding activities of federal agencies," but it does not explain what that means. Govt Br. 15-16. Nor does it explain what duties Section 504 places on those "providers" with regard to their "funding activities," other than their duty not to discriminate.

[5] Such a construction of Section 505 would be particularly anomalous given that the entire purpose of the 1978 Amendments was to "extend and strengthen" the Act. H.R. Rep. No. 1149, 95th Cong., 2d Sess. 1, 2 (1978), *reprinted in* 1978 U.S.C.C.A.N. 7312, 7313; *see Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 635 (1984) (Section 505(a)(2) "designed to enhance the ability of handicapped individuals to assure compliance with" Section 504) (quoting S. Rep. No. 890, 95th Cong., 2d Sess. 18 (1978)).

Presumably, the government means that Section 505(a)(2) should be read to create a cause of action against "Federal provider[s]" by persons whose real complaint concerns discrimination by "non-federal entities" that receive funds from those agencies. *See* Govt Br. 16 n.8. And presumably the government concedes that damages would be available against Federal providers in such a cause of action, inasmuch as they do not contest that damages are available under the Title VI remedies adopted by Section 505(a)(2). Yet the government never explains the circumstances in which it thinks such a cause of action is available to challenge an agency's "funding activities."

It surely does not mean that Congress intended an action to be available against the funding agency anytime it funds a non-federal recipient that has violated Section 504. Recognizing such a cause of action would not only be at odds with this Court's decision in *Cannon*[6] and the D.C. Circuit's decision in *Women's Equity Action League* v. *Cavazos*,[7] it would also be contrary to the decision of every Court of Appeals to have decided the issue since *Cannon*, whether considering the issue only under Title VI, or under Section 504.[8] Alterna-

[6] *Cannon* v. *University of Chicago*, 441 U.S. 677, 706 n.41, 710-11 n.46, 715 n.51 (1979).

[7] 906 F.2d 742, 747-50 (D.C. Cir. 1990).

[8] *See Washington Legal Foundation* v. *Alexander*, 984 F.2d 483 (D.C. Cir. 1993) (Title VI); *Marlow* v. *United States Dep't of Educ.*, 820 F.2d 581 (2nd Cir. 1987) (Section 504), *cert. denied*, 484 U.S. 1044 (1988); *Salvador* v. *Bennett*, 800 F.2d 97 (7th Cir. 1986) (Section 504); *NAACP* v. *Medical Center, Inc.* 599 F.2d 1247, 1254 n.27 (3d Cir. 1979) (Title VI and Section 504).

tively, the government may mean that federal agencies are suable only where their "funding activities" are such that they have effectively become discriminators themselves. If so, this would produce a particularly perverse reading of Sections 504 and 505: it would mean that although Congress expressly amended Section 504 to prohibit discrimination by the federal government, at the same time it expressly declined to create any remedy against the government for that discrimination, but nevertheless intended a new remedy against the federal government -- including money damages -- to challenge its *funding* of other entities that have discriminated, provided the government is implicated in that other entity's discrimination. The Court should not adopt such an implausible reading of Congress' intent. Nothing in the statute or its history anywhere suggests that Congress favored such an indirect, incomplete way to achieve the clear purpose of the 1978 Amendments to Section 504: stopping discrimination against the disabled by federal authorities.[9]

Finally, and in any event, even if the government were correct that the term "Federal provider" in Section 505(a)(2) must be read strictly in isolation, Griff Lane is entitled to damages against the Department of

[9] As Judge (now Justice) Ginsburg wrote in *Women's Equity Action League*, Congress contemplated two circumstances in which a federal agency might be sued for a violation of Section 504 and be subject to Title VI remedies for that violation: "[a] federal agency might itself be charged with discrimination, *see Traynor* v. *Turnage*, 485 U.S. 535 (1988), or as provider of financial assistance, with facilitating or encouraging a specific fund recipient's discrimination. *See, e.g.*, *Gautreaux* v. *Romney* [448 F.2d 731 (7th Cir. 1971)]." 906 F.2d at 750. In *Gautreaux*, because of "HUD's knowing acquiescence in [a federal recipient's] admitted discriminatory housing program," the court concluded that "the Secretary's * * * actions constituted racially discriminatory conduct in their own right." 448 F.2d at 737, 739 (footnote omitted). Thus, in both situations contemplated by Justice Ginsburg, the agency has discriminated in violation of Section 504 and is subject to Title VI remedies for that violation.

Transportation under that reading. DOT is unquestionably a "Federal provider"; [10] it unquestionably has violated Section 504; and since Section 505(a)(2) nowhere limits its remedies to the "funding activities" of providers, as suggested by the government, but says simply and only that "[t]he remedies * * * in title VI * * * shall be available to any person aggrieved by *any act* * * * [by a] Federal provider * * * under section [504]" (emphasis supplied), DOT's discriminatory "act" in this case is covered by the plain language of the statute. [11] Accordingly, Title VI remedies are available to compensate for that act. [12]

c. Even if the 1978 Amendments were not sufficiently clear by themselves to establish Congress' intent to make all remedies (including damages) available against all entities violating Section 504, the Rehabilitation Act Amendments of 1986 (Section 1003(a)(1) and (a)(2), 42 U.S.C. § 2000d-7(a)(1) and (a)(2)) served that purpose. In those Amendments Congress affirmed that "private" and "public" entities (including States) that

[10] *See* 49 C.F.R. § 27.3 (regulations concerning nondiscrimination on basis of handicap "appl[y] to each recipient of Federal financial assistance from the Department of Transportation and to each program or activity that receives or benefits from such assistance"); 49 C.F.R. § 27.5 (defining "Federal financial assistance" as, *inter alia* "any * * * other arrangement by which the Department provides or otherwise makes available assistance in the form of: Funds * * *"); *see also* 49 C.F.R. § 21 Appendix A (listing programs through which DOT provides assistance for purposes of Title VI).

[11] Congress obviously could have limited the liability of Federal providers to their "funding activities," as the government urges, but it did not do so. Instead, it made those providers liable for "any act" in violation of Section 504. Accordingly, the Court "must presume" that Congress "mean[t] * * * what it sa[id]" and intended this broader liability. *FDIC* v. *Meyer*, 114 S. Ct. 996, 1004 (1994) (citation omitted).

[12] As noted, the government does not dispute that Title VI remedies include money damages.

violate Section 504 are subject to the same remedies -- "including remedies both at law and in equity." And in *Franklin* this Court made clear that those remedies include damages. In response, the government offers two arguments concerning these Amendments that ignore both Congress' purpose in enacting them and what Congress actually said in them.

First, the government contends that the 1986 Amendments merely "illustrate that Congress knew how to waive" an entity's immunity for damages "when it wished to do so," and that while it did so for States in the 1986 Amendments, it "did not do so with regard to damages under Section 504(a)." Govt Br. 20. But the purpose of the 1986 Amendments was to respond to this Court's decision in *Atascadero*. And contrary to the government's characterization of that decision, it did *not* hold "that Congress had not waived the sovereign immunity of the States against actions in federal court *for money damages* under Section 504." Govt Br. 20 (emphasis supplied). What it actually held was that the federal courts had no jurisdiction at all over an action under Section 504 against States, because States were not named *at all* in Section 504. 473 U.S. at 245-46.

Accordingly, in the first part of the 1986 Amendments (Section 1003(a)(1)), Congress made clear that States are subject to Section 504 (among other statutes) and expressly provided that they would not be immune from suit for violations of that Section. Obviously, no comparable provision was needed addressing the Federal government's immunity because, unlike States, "Executive agenc[ies]" had already been expressly covered by Section 504 since 1978.

Then, in the second part of the 1986 Amendments (Section 1003(a)(2)) Congress made clear the remedies for suits against States under Section 504. The government says that this part "met the unequivocal-statement standard for waiving the States' sovereign immunity against suit for specific remedies," yet as to the Federal

government's immunity from those remedies did nothing more than "drop coy hints." Govt Br. 22. [13] Again, the 1986 Amendments were addressed primarily to the States, not the Federal government. And in any case, the pertinent statutory language of the second part of the 1986 Amendments actually provides: "In a suit against a State for a violation of [Section 504], remedies (including remedies both at law and in equity) are available * * * to the same extent as such remedies are available in the suit against any public or private entity other than a State." 42 U.S.C. § 2000d-7(a)(2).

Thus, the unequivocal waiver of damages as to States which the government concedes is presented by this language was *dependent* upon the fact that such damages were *already available* against "any public or private entity" covered by Section 504 -- which included the Federal government. This is not a "coy hint" concerning the Federal government's liability. It is a clear statement that the States' liability should be *the same* as the Federal government's. Indeed, the name given to these Amendments (as shown in the Appendix to the government's own brief) was "Civil rights *remedies equalization.*" Govt Br. 3a (emphasis supplied).

In an effort to explain all this away, the government offers its most tortured statutory reading. The government contends that the equalization effectuated by the 1986 Amendments "applies only to remedies available for violation of statutes referred to in Section 1003(a)(1), *i.e.*, statutes that prohibit discrimination by recipients of federal financial assistance, including Section 504, Title VI, Title IX, and the Age Discrimination Act of 1975." Govt Br. 21-22. According to the government, "[i]t is thus likely that the 'public entities' to which Congress referred in Section 1003(a)(2) are not federal entities, but are the non-federal public entities receiving

[13] Quoting *Dellmuth* v. *Muth*, 491 U.S. 223, 230-31 (1989).

federal financial assistance that are covered by all of these statutes * * *." Govt Br. 22.

Again, the government is ignoring what the statute actually says. It is true that all of the statutes named in Section 1003(a)(1) cover non-federal public entities receiving federal financial assistance. But it is not true that these are the *only* "public entities" covered by this provision. Section 504 is specifically included in the provision and it is indisputable that the Federal government is a "public entity" covered by that Section. Furthermore, despite its use of the term "recipients of Federal financial assistance" in Section 1003(a)(1), Congress did not use that term in Section 1003(a)(2). Instead, rather than equalize remedies against States only with those available against recipients of federal financial assistance, it broadened that equalization to remedies available against "any public or private entity." Accordingly, it is not only not "likely," but it is implausible to suppose that the "public entities" whose liability was equalized with that of the States in the 1986 Amendments is limited only to recipients of federal financial assistance and did not include the Federal government.

4. Having no good answer to these clear indications in the 1978 and 1986 Amendments that damages are available for the Federal government's violation of Section 504, the government resorts to a related statutory provision to try to undermine this availability -- Section 501 of the Rehabilitation Act. As it does with the 1986 Amendments, the government argues that Congress showed with regard to Section 501 that it knows how to waive sovereign immunity for damages "in the required unmistakable language," and because similar language was not used with regard to Section 504, a similar waiver was not intended. Govt Br. 25. But the government overlooks the completely different context and history affecting Section 501 that explains why Congress used different language in its treatment of Sections 501 and 504.

Section 501 by its terms requires only that federal agencies adopt affirmative action plans for the hiring of disabled individuals. 29 U.S.C. § 791(b) (provided in full at Govt Br. 1a). Furthermore, as originally enacted in 1973, Section 501, unlike Section 504, did *not* confer a private right of action for those alleging a violation of its provisions. *See McGuinness* v. *United States Postal Serv.*, 744 F.2d 1318, 1319 (7th Cir. 1984).[14] As a result, in order to provide such a cause of action, Congress enacted Section 505(a)(1), and did so at the same time that it extended Section 504 to the federal government and provided (through Section 505(a)(2)) that Title VI remedies would be available for violation of that Section.

Thus, in the 1978 Amendments Congress for the first time provided a cause of action against the federal government for discrimination on the basis of disability, both in employment (Section 501) and otherwise (Section 504). It provided (in Section 505(a)(1)) that Title VII employment discrimination remedies would be available for violations of Section 501, and provided (in Section 505(a)(2)) that the normal Title VI remedies would be available for discrimination under Section 504. This differentiation in remedies was logical because Title VII, like Section 501, concerns discrimination in employment, and Title VI, like Section 504, broadly concerns discrimination in "programs and activities."

When Section 505 was enacted in 1978, Title VII provided only for the equitable remedies of reinstatement and back pay. In contrast, as noted, Title VI provided for money damages as well. As a result, in 1991 Congress amended Title VII (and Section 501) through the Civil Rights Act of 1991, Pub. L. No. 102-

[14] Federal courts interpreting Section 501 before 1978 uniformly held that it conferred no private right of action. *Coleman* v. *Darden*, 595 F.2d 533, 538-39 (10th Cir.), *cert. denied*, 444 U.S. 927 (1979); *Ryan* v. *FDIC*, 565 F.2d 762, 763 (D.C. Cir. 1977); *McNutt* v. *Hills*, 426 F. Supp. 990, 997-98 (D.D.C. 1977).

166, § 102, 105 Stat. 1072, and for the first time made damages available for discrimination in employment under both Title VII and Section 501. *See Landgraf* v. *USI Film Products*, 114 S. Ct. 1483, 1490 (1994) ("Before the enactment of the 1991 Act, Title VII afforded only 'equitable' remedies. The primary form of monetary relief available was backpay.").

In spite of this history, the government argues that because Congress failed to amend the remedies available under Section 504 as it twice did for Section 501, no compensatory damages are available against the United States pursuant to Section 504. The answer, of course, is that it was *completely unnecessary* for Congress to amend Section 504 because Title VI had long been interpreted to provide compensatory damages for its violation. *See Franklin*, 503 U.S. at 70 (noting that in 1983 "a clear majority" of this Court confirmed in *Guardians Ass'n* v. *Civil Serv. Comm'n of City of New York*, 463 U.S. 582 (1983), that damages are available under Title VI for intentional violations of that statute). Moreover, when Congress re-enacted Section 504 in 1992 after *Franklin* and did so without amendment, it must be assumed to have acted with knowledge of that decision, and its determination not to amend Section 504 thus reaffirms its intention to make damages available under that Section. [15]

[15] In our opening brief we contended that Congress' 1992 reenactment of Sections 504 and 505 without change signaled its knowledge and adoption of this Court's decisions in *Cannon* and *Franklin* establishing: that a cause of action existed under Section 504; that it included damages; and that the *Franklin* presumption of all remedies being available applied to federal agencies. Lane Br. 23. The government disputes none of this.

Instead, on two grounds it challenges our reliance on Senator Jeffords' endorsement of the Ninth Circuit's *Doe* decision in the 1992 Amendments' legislative history. *See* Lane Br. 23-24. First, it says that Senator Jeffords failed to identify "the requisite unequivocal statutory waiver of immunity against money damages." Govt Br. 23. But he did: he said it was already provided in the

In summary, then, when all of Congress' intentions regarding Sections 501 and 504 are considered, it is clear that Congress was determined to treat all federal disability discrimination alike -- both in employment and other areas -- and to make the same remedies (including damages) available for both.

5. The government devotes several pages of its brief to arguing that this Court's *Franklin* decision did not "abolish" the requirement that Congress' intent to permit damages must be clear and unequivocal. Govt Br. 25-31. But we have not argued that it did; and we certainly have not argued, as the government suggests, that *Franklin* overruled *Nordic Village*. Govt Br. 28. To the contrary, we expressly acknowledged in our brief, citing *Nordic Village*, that there is a "presumption" in this case "that Congress did not intend to permit the [requested] award of * * * damages unless it unequivocally expressed its intention to do so." Lane Br. 11 (citing *United States* v. *Nordic Village, Inc.*, 503 U.S. 30, 33-34 (1992)).

At the same time, we think the government is wrong to suppose that *Franklin* has no application to a case involving sovereign immunity. That cannot possibly be so, inasmuch as most of the cases relied on in *Franklin* involved cases against the Federal government. [16]

1978 Amendments, which he wrote. 138 Cong. Rec. S16,609 (daily ed. Oct. 5, 1992). To this the government says his view of those prior Amendments is of little weight. Govt Br. 23. That is not so. Although the Court has recognized that post-enactment legislative statements may not be entitled to the same deference as contemporaneous history, it still would be " 'remiss if [it] ignored [such] authoritative expressions' " of an Act's scope and purpose, particularly when it comes from the *author* of the Act. *See North Haven Bd. of Educ.* v. *Bell*, 456 U.S. 512, 535 (1982) (quoting *Cannon*, 441 U.S. at 687 n.7); *Schwegmann Bros.* v. *Calvert Distillers Corp.*, 341 U.S. 384, 394-95 (1951).

[16] The government attempts to factually distinguish the cases relied on by the Court in *Franklin* (Govt Br. 30), but this attempt misses the point of the cases. The point is that the Court relied on

Indeed, the clearest indication that the *Franklin* presumption applies in sovereign immunity situations is demonstrated by the *Franklin* Court's own application of that presumption to States sued under Section 504. As the Court held, in providing through the 1986 Amendments that "remedies both at law and in equity" shall be available in suits against States to the same extent that they are available against "public or private entit[ies]," Congress said "nothing about the nature of those other available remedies." 503 U.S. at 72-73. Nevertheless, the Court held that "we presume Congress enacted this statute with the prevailing traditional [all-remedies] rule in mind." *Id.* at 73. And the Court so held even though

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cases against the Federal government to illustrate the long-settled application of the presumption that once a cause of action is created (including against the government), it includes all appropriate remedial relief, unless Congress clearly expresses a contrary intention. There is simply no basis, therefore, in this Court's sovereign immunity jurisprudence or elsewhere, to conclude that the *Franklin* presumption is categorically inapplicable in the sovereign immunity context.

Furthermore, the government's attempts to distinguish the cited cases are unavailing. Thus, contrary to the government's assertion, in *Bell* v. *Hood*, 327 U.S. 678 (1946), the Court did not distinguish between damages and injunctive relief, because the plaintiffs sought only money damages. *Id.* at 679. And in fact, the Court in *Bell* v. *Hood* held that the district court had jurisdiction to entertain the claims for money damages raised by plaintiffs against the agents of the federal government. *Id.* at 684-85. Similarly, while in *Kendall* v. *United States ex rel. Stokes*, 37 U.S. (12 Pet.) 524, 611 (1838), the Court stated that a waiver of sovereign immunity must be provided by an act of Congress, it nonetheless found, in a case against the United States, that the all-remedies presumption (recognized in *Franklin*) was fully applicable. *Id.* at 624. The government's attempt to distinguish *Dooley* v. *United States*, 182 U.S. 222 (1901), is similarly without merit. There, in another case against the United States, the Court did state that "a liability created by statute without a remedy may be enforced by common-law action," *id.* at 229. But this hardly denies that the *Franklin* all-remedies presumption is applicable against the federal government; rather, it defines the circumstances in which the presumption is triggered.

the abrogation of a State's immunity from damages requires the same "unequivocal expression" that is required for waiver of the Federal government's sovereign immunity. *Nordic Village*, 503 U.S. at 37; *Dellmuth* v. *Muth*, 491 U.S. at 228-29.

Accordingly, contrary to the government's view, the Court does take account of the *Franklin* all-remedies presumption in sovereign immunity cases at least where, as here, it is quite clear that sovereign immunity has been waived and the only issue is the nature of the remedies being made available.[17] Moreover, we think the government is wrong to suggest (Govt Br. 31) that the sovereign immunity presumption and the all-remedies presumption are irreconcilably in conflict and the Court must invariably choose one or the other.[18] Rather, as *Franklin* demonstrates, both presumptions are merely guides to determining Congress' intent. And here, as in *Franklin*, the Court should conclude that while a clear waiver of immunity is required to permit

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[17] As the Court has often held, where, as here, Congress has unquestionably waived sovereign immunity and the issue concerns the terms and scope of the waiver, "the Court should be careful not to 'assume the authority to narrow the waiver that Congress intended.' " *Ardestani* v. *INS*, 502 U.S. 129, 137 (1991) (quoting *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979)).

[18] In particular, the government is wrong to say that the "Court has uniformly ruled" that other "well-established" rules "must yield" when in "apparent conflict" with "the principle of sovereign immunity." Govt Br. 31. First, if there were a "conflict" here, *Franklin* itself demonstrates that the all-remedies presumption applies even in sovereign immunity situations. And second, the only case the government cites for its "uniform rule" is *Block* v. *North Dakota*, 461 U.S. 273 (1983). Govt Br. 31. But there, far from holding that one presumption (federal sovereign immunity) trumped another (the States' immunity from statutes of limitation), the Court harmonized them by examining the statute and its legislative history to determine whether, in waiving the Federal government's sovereign immunity for a particular suit, Congress had intended to make an exception for States who did not file within the statute of limitations.

recovery of damages, the language of the Rehabilitation Act effectuates that clear waiver and, moreover, the waiver is confirmed by the all-remedies presumption (a presumption Congress knew to be applicable to federal agencies and to Section 504 when it re-enacted that Section in 1992).

6. In its final effort to resist Congress' clear intention to provide a damages remedy in this case, the government implies in a footnote -- but does not affirmatively argue -- that Lane may not have a cause of action *at all* under Section 504, but only under the Administrative Procedure Act ("APA"). Govt Br. 27 n.17. It makes this suggestion because, as it notes, "[t]he waiver of federal sovereign immunity in the APA is limited to an action 'seeking relief other than money damages.' " *Id.* at 27-28 n.17 (citing 5 U.S.C. § 702). We do not think this suggestion is properly before the Court and in any case it is without merit.

a. The district court in this action expressly held that it was authorized to grant declaratory and injunctive relief against the government under Section 504. Pet. App. 57a. Based on this holding, it ordered the government to reinstate Lane at the Academy forthwith. *Id.* 63a. It furthermore originally held, until the D.C. Circuit's *Dorsey* decision required it to reverse itself, that damages were authorized against the government under Section 504. *Id.* 58a-60a. Although Lane appealed the district court's judgment with regard to damages, the government did not appeal the judgment granting declaratory and injunctive relief under Section 504. In these circumstances, we do not see how the government can now challenge that unappealed judgment and argue before this Court that there is no cause of action under Section 504. [19]

[19] *See United States* v. *Alvarez-Sanchez*, 114 S. Ct. 1599, 1605 n.5 (1994); *Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

b. In any event, the government's belated APA claim is incorrect. As support for its claim, the government cites Judge (now Justice) Breyer's opinion for the First Circuit in *Cousins* v. *Secretary of United States Dep't of Transportation*, 880 F.2d 603, 605 (1989) (en banc). But as the Ninth Circuit explained in *Doe*, the circumstances in *Cousins* are very different from those presented here. *See* 941 F.2d at 793-94.

Cousins was a deaf man prevented by a DOT regulation from obtaining a license to work as a truck driver. Cousins therefore brought an action in district court under Section 504 alleging that the DOT regulation was discriminatory. The First Circuit held that "even though § 504's substantive standard applies, more broadly, to 'any program or activity conducted by any Executive agency' (presumably including regulatory programs), the Act is silent about whether and how a person injured by the government *as regulator* is to enforce the Act against the government." 880 F.2d at 605 (emphasis in original). And where a person challenges the government's action as a "regulator," the court held, there is "normally no *need* for an 'implied private right of action' " because APA review can afford such a person "adequate relief." *Id.* at 606 (emphasis in original). Indeed, the court said "it is difficult to imagine a case where an implied private right of action under some other statute [besides the APA] would be of much use to a plaintiff who wants to challenge agency action." *Id.*

For two reasons, *Cousins* has no application here. First, Lane does not challenge the actions of DOT and the other defendants as "regulators." Rather, he challenges their unlawful adjudications on the particular facts in his individual case. [20] Second, in any event his

[20] The district court's ruling in this case makes the individualized nature of Griff Lane's claim unmistakable:

> [T]he Court finds that the Defendants violated Section 504 of the Rehabilitation Act in separating Lane from the Academy, as they have failed to show that meeting the

case is plainly not the type envisioned in *Cousins*, *i.e.*, one in which "APA review can afford [him] adequate relief." APA relief cannot make Griff Lane whole for the government's violation of the Rehabilitation Act in this case. Only the damages remedy under Section 504 can do so. This Court should make that remedy available to him now.

Respectfully submitted,

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physical qualifications for commissioning in the armed forces reserve is an essential program requirement of the [Academy], they have not even attempted to make any reasonable accommodations for Lane's disability, and they failed to make an individualized inquiry into the particular facts of Lane's case. [Pet. App. 61a.]

Supreme Court, U.S.
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No. 95-365

IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF RETIRED PERSONS, AMERICAN COUNCIL OF THE BLIND, BAZELON CENTER FOR MENTAL HEALTH LAW, CALIFORNIA WOMEN'S LAW CENTER, CHINESE FOR AFFIRMATIVE ACTION, DISABILITY RIGHTS EDUCATION AND DEFENSE FUND, EMPLOYMENT LAW CENTER, EPILEPSY FOUNDATION OF AMERICA, LAMBDA LEGAL DEFENSE AND EDUCATION FUND, NATIONAL ALLIANCE FOR THE MENTALLY ILL, NATIONAL ASSOCIATION OF THE DEAF, NATIONAL ASSOCIATION OF PROTECTION & ADVOCACY SYSTEMS, NATIONAL COUNCIL ON INDEPENDENT LIVING, NATIONAL EMPLOYMENT LAWYERS ASSOCIATION, NATIONAL PARENT NETWORK ON DISABILITIES, NEW YORK LAWYERS FOR THE PUBLIC INTEREST, THE ARC, UNITED CEREBRAL PALSY ASSOCIATIONS, WESTERN LAW CENTER FOR DISABILITY RIGHTS, AND WORLD INSTITUTE ON DISABILITY, IN SUPPORT OF PETITIONER

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-365

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF AMICI CURAIE AMERICAN ASSOCIATION OF RETIRED PERSONS, ET AL. IN SUPPORT OF PETITIONER

INTEREST OF *AMICI CURIAE*[1]

Amici American Association of Retired Persons, *et al.* are twenty organizations, including thirteen advocacy and service organizations nationwide that represent and serve the 49 million Americans with disabilities and their families, plus seven legal and civil

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[1] This brief is filed with consent of the parties. Copies of the consent letters are on file with the Clerk.

rights organizations representing and serving the members of other minority communities and women in the United States. Each organization works to eliminate historical stereotypes, prejudices and the resulting discriminatory practices and policies that serve to exclude Americans with disabilities, members of other minority communities, and women from participating as valued and contributing members of our society. *Amici* include premier law and policy organizations that are nationally respected for their expertise in federal non-discrimination law. As such, *amici* are often called on by policymakers, legislators and courts to assist in the development and interpretation of federal civil rights statutes.

Amici know through experience that the availability of monetary damages to redress violations of civil rights is essential to enforce the guarantee of equal citizenship that has been provided to Americans with disabilities, as well as other minorities and women, by federal law. In this case, the Court will resolve the question of whether suit for monetary damages will lie against the federal government under Section 504 of the Rehabilitation Act of 1973. Given the broad reach and scope of federal activities, and the pivotal leadership role assigned to the federal government under national civil rights laws, *amici* recognize that this Court's decision will have a substantial impact on whether the federal mandate of nondiscrimination based on disability will be realized. *Amici* therefore submit the following brief in support of petitioner.

Amicus American Association of Retired Persons (AARP) is a non-profit membership organization of persons age 50 and older that is dedicated to addressing the needs and interests of older Americans. On behalf of its 32 million members, AARP seeks through education, advocacy, and service to enhance the quality of life for all by promoting independence, dignity, and purpose. As part of its advocacy work, AARP has participated as

amicus curiae in numerous cases regarding the interpretation of federal nondiscrimination statutes.

Amicus American Council of the Blind (ACB) is the nation's largest non-profit membership organization of people who are blind and visually impaired. ACB seeks to ensure that blind individuals have the opportunity to participate fully in all aspects of American life, and to that end works to promote strong state and federal nondiscrimination laws.

Amicus Bazelon Center for Mental Health Law is a Washington, D.C.-based public interest organization founded in 1972 to advocate the rights of children and adults with mental disabilities. It has brought major cases decided by this Court establishing the rights of people with mental disabilities, and it has participated as *amicus curiae* in front of this Court in more than a dozen additional cases.

Amicus California Women's Law Center (CWLC) is a private, non-profit public interest law center established in 1989 to address the comprehensive civil rights of women and girls. Consistent with this mission, CWLC provides training, technical assistance, advocacy support and legal assistance to legal services agencies, community based organizations, attorneys and policymakers. Since its inception, CWLC has placed a strong emphasis on addressing the rights of women and girls who are the poorest and most marginalized in our communities, and who suffer discrimination based on gender and class, race, disability, age, sexual orientation, or other minority status.

Amicus Chinese for Affirmative Action (CAA) is a non-profit, membership supported organization that advocates, defends and promotes the civil and political rights of Chinese and Asian Americans within the context of, and in the interest, of advancing multiracial democracy in the United States. CAA is a 1200 membership strong organization that believes in equal access and equal opportunities to all people, regardless

of race gender, disability, age, religion, economic, or social status.

Amicus Disability Rights Education and Defense Fund (DREDF) is the nation's premier law and policy center dedicated to protecting and advancing the civil rights of people with disabilities. DREDF is nationally recognized for its expertise in the interpretation of federal disability civil rights laws.

Amicus Employment Law Center (ELC) is a project of the Legal Aid Society of San Francisco, a private, non-profit organization. ELC's primary goal is to improve the working lives of disadvantaged people. Since 1970, ELC has represented clients in individual and class action cases covering a broad range of employment-related issues, including discrimination on the basis of race, gender, age, disability, pregnancy, citizenship, sexual orientation and national origin.

Amicus Epilepsy Foundation of America is a national non-profit corporation founded in 1968 to advance the opportunities of the two million persons with epilepsy. The Foundation has a long-standing commitment to eliminating the stereotypes and prejudices that serve to exclude persons with epilepsy from society.

Amicus Lambda Legal Defense and Education Fund (Lambda) is the nation's oldest and largest non-profit organization dedicated to the civil rights of lesbians, gay men and all people with HIV/AIDS. Since filing the country's first AIDS discrimination case in 1983, Lambda has had a continuing involvement in the development of fair and rational policies relating to HIV/AIDS. Through its participation in both state and federal HIV/AIDS discrimination cases, Lambda has had extensive experience with disability civil rights statutes.

Amicus National Alliance for the Mentally Ill (NAMI) is a national organization with 225 state and local affiliates. As a mutual support, self-help and advocacy organization, NAMI provides programs in

education, community service, vocational education and support to over 130,000 persons with mental illness and their families each year.

Amicus National Association of the Deaf (NAD) is a national non-profit organization whose members are deaf adults, parents of deaf children, and professionals in the area of service to individuals who are deaf. NAD is the largest consumer organization of people who are deaf in the United States.

Amicus National Association of Protection and Advocacy Systems (NAPAS) is the national voluntary membership organization of the Protection and Advocacy Systems and Client Assistance Programs. The member agencies of NAPAS are designated by the Governor of their state or territory, and are federally mandated to pursue legal, administrative, and other remedies to protect and promote the legal rights of persons with disabilities. In FY 94, these agencies provided services to nearly 70,000 persons, reflecting the full spectrum of disabling conditions.

Amicus National Council on Independent Living (NCIL) was established in 1982 as the national voice of independent living centers, which provide advocacy, information and referral services, independent living skills training and peer counseling to people with all disabilities, and which are governed and controlled by people with different types of disabilities. NCIL was organized in part to support independent living centers by conducting and coordinating the national advocacy efforts of the independent living movement. Towards that end NCIL works to ensure that the civil rights of people with disabilities are strengthened and protected by law.

Amicus National Employment Lawyers Association (NELA) is a voluntary organization, founded in 1985, of over 2,600 attorneys who specialize in representing individuals in controversies arising out of the workplace. It is the country's only professional

membership organization comprised of lawyers who represent employees in cases involving employment discrimination, employee benefits, wrongful discharge, and other employment-related matters. NELA has devoted itself to supporting precedent-setting litigation and remedial legislation affecting the rights of individuals in the workplace.

Amicus National Parent Network on Disabilities (NPND) is a national membership organization that represents over 500,000 parents and families who have a member with a disability. NPND's mission is to speak as a collective voice representing the perspectives, needs and interests of parents and family members of persons of all ages with a disability.

Amicus New York Lawyers for the Public Interest (NYLPI), through its Disability Law Center and its *pro bono* clearinghouse of 68 private law firms and corporate law departments, advocates for the rights of persons with disabilities across New York State. NYLPI has appeared as *amicus curiae* and represented *amicus curiae* before this Court in several cases involving the rights of persons with disabilities.

Amicus The Arc is the largest voluntary organization in the country devoted to securing the rights of, and effective services for, approximately seven million Americans with mental retardation. The Arc has a national membership of more than 120,000 people, including persons with mental retardation and their parents, and has approximately 1,100 state and local chapters throughout the country. Members of Congress, state legislatures, rulemaking authorities, and the courts regard The Arc as a leading advocate for citizens with mental retardation.

Amicus United Cerebral Palsy Associations (UCPA) is a national non-profit voluntary health organization formed in 1949. UCPA assists its 162 affiliates throughout the country in the provision of rehabilitation and related direct services, such as

education and advocacy programs, and other activities designed to promote the welfare of people with disabilities.

Amicus Western Law Center for Disability Rights (WLCDR) is a Los Angeles based public interest legal services organization. For the past two decades WLCDR has dedicated itself to the preservation and advancement of the civil rights of people with disabilities.

Amicus World Institute on Disability (WID) is a private, non-profit corporation focusing on major policy issues from the perspective of the disabled community. Founded in 1983 by persons who have been deeply committed to the independent living movement, WID functions as a research center and as a resource for information, training, public education and technical assistance.

SUMMARY OF ARGUMENT

In enacting and amending Section 504 of Rehabilitation Act of 1973, Congress has unequivocally expressed its intent to waive sovereign immunity and hold the federal government liable for monetary damages caused by discrimination on the basis of disability. It is well settled that a private right of action, with monetary damages available, will lie against non-federal parties under Section 504. *See Franklin* v. *Gwinnett County Public Schools*, 503 U.S. 60 (1992), and its progeny. Plain statutory language and legislative history establish that in the 1978 Amendments to Section 504 Congress sought to equalize treatment of federal and non-federal parties. *See, e.g., Doe* v. *Attorney General of the United States*, 941 F.2d 780, 792 (9th Cir. 1991). Congressional intent to unify the enforcement scheme of Section 504 is further evidenced by the 1986 Amendments to Section 504, which clarified that monetary damages are available against any public

agency. The Congressional intent to ensure consistency among Section 504 defendants was also confirmed by legislative history accompanying the 1992 reauthorization of the Rehabilitation Act, in which Senator Jeffords, a primary author of the 1978 Amendments, approved cases that confirmed the equality of remedies as between federal and non-federal defendants. 138 Cong. Rec. 16,609 (Oct. 5, 1992).

In light of this clear Congressional purpose, the D.C. Court of Appeals erred in holding that *United States* v. *Nordic Village, Inc.*, 503 U.S. 30 (1992), requires judgment for the government in this case. Petitioner has demonstrated the "unequivocal waiver" of sovereign immunity as required by *Nordic Village* and numerous prior decisions of this Court. To the extent that *Nordic Village* changed the law -- in 1992 -- by holding that legislative history has no bearing on the construction of such waivers, it is inapplicable to construction of Congress's intent in 1978 in amending Section 504. As this Court confirmed in *Franklin*, *supra*, Congressional intent must be gleaned from the state of the law at the time Congress acted.

Lastly, a damages remedy against the federal government is necessary to implement legislative intent to deter federal misconduct, ensure effective enforcement, and provide for adequate redress of disability rights violation. Without damages available to enforce the Congressional mandate, Section 504's promise of federal non-discrimination rings hollow as a practical matter. Statutory language, legislative history, and public policy all dictate that Section 504 damage suits will lie against the federal government. The Court should reverse the D.C. Circuit's erroneous holding to the contrary.

I. RECOGNITION OF A DAMAGES REMEDY AGAINST THE FEDERAL GOVERNMENT FOR VIOLATIONS OF SECTION 504 IS NECESSARY TO IMPLEMENT CONGRESSIONAL INTENT.

As discussed below, this Court has recognized that monetary damages are available under Section 504 to remedy discrimination by recipients of federal financial assistance. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992).[2] By adding the federal government to Section 504 in 1978, Congress intended to ensure that people with disabilities who suffered discrimination by the federal government would have the same rights and remedies as those who were discriminated against by private entities. As Senator Jeffords, author of the 1978 Amendments has stated, "[t]o construe the statute otherwise would be the height of hypocrisy, expecting private entities to bear a burden that the federal government itself is unwilling to carry." 138 Cong. Rec. S16,609 (1992).

A. Section 504 Created A Broad Nondiscrimination Mandate Enforceable Against Recipients Of Federal Financial Assistance Through A Private Right Of Action, With Monetary Damages Available.

As originally enacted in 1973, Section 504 of the Rehabilitation Act prohibited discrimination on the basis

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[2] The specific question presented and decided in *Franklin* was whether compensatory damages are available under Title IX of the Education Amendments of 1972. However, because both Title IX and Section 504 incorporate the remedies of Title VI of the Civil Rights Act of 1964, the *Franklin* Court's decision effectively resolved a remedial issue applicable to all three statutes, and has been so regarded by lower courts since 1992. *See, e.g., J.L. & K.P.* v. *Social Security Admin.*, 971 F.2d 260, 264 (9th Cir. 1992); *Justice* v. *Pendleton Place Apartments*, 40 F.3d 139, 142 (6th Cir. 1994); *Pandazides* v. *Virginia Bd. of Educ.*, 13 F.3d 823, 830 (4th Cir. 1994); *Rogers* v. *Magnet Cove Public Schools*, 34 F.3d 642, 645 (8th Cir. 1994); and *Waldrop* v. *Southern Co. Services, Inc.*, 24 F.3d 152, 156-157 (11th Cir. 1994).

of disability by non-federal entities receiving federal financial assistance, using statutory language patterned after Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d-1 (relating to race, color or national origin), and Section 901 of the Education Amendments of 1972, 42 U.S.C. § 1683 (relating to sex). *See* Pub. L. No. 93-112, 87 Stat. 355 (1973), codified at 29 U.S.C. § 794.

As noted in Congressional Committee Reports accompanying later amendments to this legislation, Section 504 thus "constitute[d] the establishment of a broad governmental policy" against disability discrimination by federally-funded parties. S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6390. Subsequent Congressional action with respect to Section 504---including amendments in 1974, 1978, 1986 as to remedies---has been directed towards reaffirming and strengthening this nondiscrimination mandate, and its enforcement scheme.

In the first set of amendments to the Act in 1974, Congress expressed its intent that enforcement of Section 504 "permit a judicial remedy through a private action." S. Rep. No. 1297, 93d Cong., 2d Sess. 40, *reprinted in* 1974 U.S. Code Cong. & Admin. News 6373, 6391. This Congressional commitment to a Section 504 judicial enforcement scheme was reaffirmed in 1978, with the incorporation of Title VI remedies into the Rehabilitation Act. Section 505(a)(2), 29 U.S.C. § 794a(a)(2).

In evaluating the body of federal civil rights statutes of which Section 504 is a part, this Court has confirmed the availability of the full panoply of remedies, including monetary damages. *See Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992). The government does not dispute the availability of damages in Section 504 cases against recipients of federal financial

assistance, but argues that it should be exempted from the same remedies.[3]

B. The 1978 Amendments To Section 504 Were Intended To Put The Federal Government On "Equal Footing" With Non-Federal Parties As To Coverage, Enforcement And Remedies

As the Ninth Circuit has correctly noted, plain statutory language, buttressed by the legislative history of the Rehabilitation Act as articulated by Congress over the past two decades, makes it "starkly clear" that the 1978 Amendments to Section 504 were "intended to put the federal government on equal footing with everyone else" with respect to both the requirements and enforcement of the disability nondiscrimination mandate. *Doe v. Attorney General of the United States*, 941 F.2d 780, 792 (9th Cir. 1991); *see also, J.L. & K.P. v. Social Security Admin.*, 971 F.2d 260 (9th Cir. 1992).

This 1978 legislative intent to equalize treatment of federal and non-federal parties is amply demonstrated by the fact that Congress elected to specify the coverage of federal agencies not only in the same section of the Rehabilitation Act as that which covers private entities (Section 504), *but in the same sentence of that same section of the law.*[4] *See also, Doe, supra,* 941 F.2d at 790.

In addition to extending coverage to the federal government, as this Court has recognized, the 1978 Amendments were also "'designed to *enhance* the ability

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[3] In the district court, respondents did "not contest" that monetary damages are available for violations of Section 504 by private parties and states. Appendix to Petition for Certioriari at 58a.

[4] In the words of the *Doe* court, "[t]he statute's internal approach is to prohibit discrimination against the handicapped by anyone and to install a unitary enforcement mechanism" that would shelter victims of federal, as well as private, discriminators. 941 F.2d at 791.

of handicapped individuals to assure compliance'" with the statute, explicitly providing for heightened judicial enforcement of the Rehabilitation Act. *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624, 635 (1984) (quoting S. Rep. No. 890, 95th Cong., 2d Sess., 18 (1978)) (emphasis added).

The mechanism through which this was accomplished was the enactment of Section 505(a)(2), 29 U.S.C. § 794a(a)(2), which made Title VI remedies available under Section 504, as well as the enactment of Section 505(b), 29 U.S.C. § 794a(b), which allows a prevailing party, other than the United States, to recover reasonable attorneys' fees in Section 504 cases.[5] This latter provision was specifically designed to continue the availability of private causes of action under Section 504, and to facilitate rather than impede private enforcement of Section 504. Congress thus reconfirmed that private enforcement of the rights conferred by the Rehabilitation Act is an important and necessary aspect of ensuring that these rights are vindicated, and provided for uniform enforcement against all parties subject to the law. S. Rep. No. 890, 95th Cong., 2d Sess 19 (1978); H.R. Rep. No. 1149, 95th Cong., 2d Sess. 21 (1978).[6]

Consequently, it is clear that in amending Section 504 in 1978, Congress was seeking to equalize treatment

[5] In addition to demonstrating the general availability of judicial enforcement of Section 504, the attorneys' fees provision containing the language "other than the United States" is a significant indication that Congress contemplated the presence of the federal government as a party to litigation under Section 504, with the sole exception to uniformity in judicial enforcement being that the U.S. would not be entitled to attorneys' fees as a prevailing party. *See also* discussion in *Doe, supra*, 941 F.2d at 790.

[6] The 1978 Senate Report states that an attorneys' fee provision was necessary to assist "'disabled people, who desperately need to vindicate their rights through the courts.'" S. Rep. No. 890, 95th Cong., 2d Sess. 19 (1978).

of federal and non-federal parties under a statute that it intended, and clearly regarded, as providing for a private right of action, and for a monetary damages remedy.[7]

II. THE CONGRESSIONAL INTENT TO WAIVE SOVEREIGN IMMUNITY IN SECTION 504 CASES AGAINST THE FEDERAL GOVERNMENT IS CLEAR AND UNEQUIVOCAL.

A. The 1978 And 1986 Amendments And Their Legislative History Make Clear That Congress Intended To Allow Private Suits And Monetary Damages To Implement Section 504, Against Recipients Of Federal Financial Assistance And The Federal Government Alike

Through the 1978 Amendments to Section 504 equalizing federal and non-federal remedies, Congress has clearly effected the necessary "unequivocal expression" of waiver of federal sovereign immunity for damages, as required by the body of case law recently including *United States v. Nordic Village, Inc.*, 503 U.S. 30 (1992).

While Congress will be understood to have waived the federal government's sovereign immunity from suit only if the waiver is "unequivocally expressed," *id.* at 33, this Court has also stated that it

[7] This interpretation of the 1978 Amendments is consistent with their overall purpose, as expressed by the legislators enacting them. The sponsors and proponents of the Senate bill repeatedly assured their colleagues that the purpose and effect of the legislation was to expand the opportunities for people with disabilities. Senator Randolph, the floor manager, opened the debate by asserting that "*[a]ll* of the provisions of this bill...not only provide opportunities to handicapped Americans to aspire to certain goals but also provide the means by which they can reach those goals." 124 Cong. Rec S30,303 (1978) (emphasis added).

will not "'assume the authority to narrow the waiver that Congress intended,' or construe the waiver 'unduly restrictively'". *Irwin* v. *Dep't. of Veterans Affairs,* 498 U.S. 89, 94 (1990) (quoting *Bowen* v. *City of New York,* 476 U.S. 467, 479 (1986) (internal citations omitted)).[8]

In this case, both the language of the statute itself and its legislative history confirm Congressional intent to waive sovereign immunity. As discussed above, Congress added the federal government to the same section of the law as recipients of federal financial assistance and made the same remedies applicable. As this Court held in *Franklin* v. *Gwinnett County, supra*, Congress intended the full panoply of remedies to be available. Hence, on its face, Section 504, and Section 505's incorporation of Title VI remedies, confer a damages remedy against the federal government. There is no indication in the language of the statute indicating

[8] Relatively broad construction of waivers, and corresponding narrow construction of exceptions to waivers, has often been applied to cases brought against the federal government under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* *See, e.g., Irwin, supra,* 498 U.S. 89 (1990) (equitable tolling rule applicable to suits against private defendants also applies to suits against the federal government under Title VII); *Loeffler v. Frank,* 486 U.S. 549 (1988) (prejudgment interest may be awarded in a suit against the U.S. Postal Service under Title VII); *Chandler v. Roudebush,* 425 U.S. 840 (1976) (plaintiff's right to trial *de novo* extends to suit against federal government as well as against non-federal parties).

Moreover, in cases in which this Court has ruled to the contrary in Title VII cases, the holdings have been grounded in clear evidence that Congress did not intend equal treatment of federal and non-federal parties. *See, e.g., Library of Congress v. Shaw,* 478 U.S. 310 (1986) (Congressional awareness of long-standing "no interest" rule against the federal government precludes finding waiver as to interest absent explicit statement to that effect in Title VII); *Brown v. General Servs. Admin.,* 425 U.S. 820 (1976) (precisely drawn, detailed statutory structure and legislative history of Title VII provides clear evidence that Congress intended it to be exclusive judicial remedy for claims of discrimination in federal employment).

that Congress intended different remedies to apply to federal and non-federal defendants. As discussed above, the 1978 amendments were "designed to *enhance* the ability of handicapped individuals to assure compliance" *Consolidated Rail Corp. v. Darrone,* 465 U.S. 624, 635 (1984) (quoting S. Rep. No. 890, 95th Cong., 2d Sess. 18 (1978)) (emphasis added) against both the federal government and recipients of federal financial assistance.[9]

Moreover, as argued in Petitioner's brief the 1986 Amendments to Section 504 further clarified that damages were available against "*any* public agency." The amendment does not exempt the federal government and cannot possibly be interpreted to convey a dual standard as between federal and non-federal entities. *See* Petitioner's brief at 21-23.

In applying the rule of law requiring "unequivocal expression" of Congressional waivers of sovereign immunity, judicial statutory construction of the scope of such waivers has historically taken into consideration legislative history and Congressional intent of precisely the kind on which the Ninth Circuit based its decisions in *Doe* and *J.L.*.[10]

[9] Since *Nordic Village, supra,* this Court has stated that:

"if it were quite clear from the balance of the statute" that a particular governmental liability was intended, statutory failure to specify such liability "might be treated as a statutory gap that the courts could fill by decisional law." *Smith v. United States,* 507 U.S. 197 (1993).

[10] *See, e.g., Ardestani* v. *INS,* 502 U.S. 129 (1991); *Loeffler v. Frank,* 486 U.S. 549 (1988); *Library of Congress v. Shaw,* 478 U.S. 310 (1986); *Franchise Tax Board of California v. United States Postal Serv.,* 467 U.S. 512 (1984); *United States v. Mitchell,* 445 U.S. 535 (1980); *United States v. Kubrick,* 444 U.S. 111 (1979); *Brown v. General Servs. Admin.,* 425 U.S. 820 (1976); *Chandler v. Roudebush,* 425 U.S. 840 (1976); *United States v. King,* 395 U.S. 1 (1969).

Moreover, this Court has particularly emphasized the need to examine legislative history when faced with questions concerning the scope of Section 504 and its remedial provisions, and has consistently refused to interpret Section 504 as containing limitations inconsistent with clear Congressional purposes. As this Court stated in *Consolidated Rail Corp.* v. *Darrone*, 465 U.S. 624, 633 n.13 (1984), "language as broad as that of § 504 cannot be read in isolation from its history and purposes." *See also*, *Alexander* v. *Choate*, 469 U.S. 287 (1985).[11]

Nevertheless, in the reasoning of the D.C. Circuit in *Dorsey v. United States Dep't. of Labor*, 41 F.3d 1551 (D.C. Cir. 1994), the legislative history to which the Ninth Circuit looked in *Doe* and *J.L.* must be disregarded, because this Court's 1992 decision in *Nordic Village* has changed the law by holding that legislative history has no bearing on construction of waivers of federal sovereign immunity.

Such a change in law, if indeed it has occurred, is clearly inapplicable to the interpretation of Section 504, given that any pronouncement to disregard legislative history is directly contrary to prior judicial interpretations of which Congress can be presumed to have been aware when it enacted the Rehabilitation Act in 1973, and amended it in 1974, 1978, 1986 and 1990.

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11 In *Consolidated Rail Corp. v. Darrone*, 465 U.S. 624 (1984), based on legislative history this Court held that Congress had not intended to incorporate into Section 504 the employment limitation of Section 604 of Title VI.

In *Alexander v. Choate*, 469 U.S. 287 (1985), this Court addressed the question of whether Section 504 prohibited disparate-impact discrimination. Despite the holding of a majority of the Court in *Guardians Ass'n v. Civil Serv. Comm'n*, 463 U.S. 582 (1983) that Title VI itself did not prohibit disparate-impact discrimination, the *Alexander* Court declined to extend this limitation on the scope of Title VI to Section 504, again basing decision on the legislative history of Section 504.

This Court has explicitly recognized that in determining Congressional intent, "we evaluate the state of the law when the legislature passed" the statute in question. *Franklin, supra*, 503 U.S. at 71. As the *Franklin* Court noted, in enacting and amending the nondiscrimination laws of the 1960s and 1970s, Congress legislated against the backdrop of a clear and long-standing "traditional presumption in favor of all appropriate relief," as well as an assumption that legislative history and Congressional intent would be taken into account in assessing available remedies. *Id. See also*, *Cannon* v. *University of Chicago,* 441 U.S. 677 (1979); *Cort* v. *Ash,* 422 U.S. 66 (1975) (identifying legislative history and intent as critical to judicial determination of whether a remedy has been created by statute).

Pursuant to the applicable body of case law regarding the construction of Congressional waivers of federal sovereign immunity, the statutory language and legislative history of the 1978 and 1986 Amendments to Section 504 must be read to subject the federal government to suit for monetary damages.

Any other interpretation would result in a "crabbed construction" that "overlooks our admonition that waiver of sovereign immunity is accomplished not by `a ritualistic formula'; rather intent to waive immunity and the scope of such a waiver can only be ascertained by reference to underlying congressional policy." *Franchise Tax Board, supra,* 467 U.S. at 521 (citing *Keifer & Keifer* v. *Reconstruction Finance Corp.* 306 U.S. 381, 389 (1939)). *See also*, *Dellmuth* v. *Muth,* 491 U.S. 223, 233 (1989) (Scalia, J. concurring) (Congressional elimination of state sovereign immunity is not precluded even if statutory text lacks explicit reference to such immunity or to the Eleventh Amendment).

B. Legislative History To The 1992 Reauthorization Of The Rehabilitation Act Expressly Reaffirmed The Availability Of A Monetary Damage Remedy Against The Federal Government, And Approved The Ninth Circuit's Decisions In *Doe* and *J.L.*

The Congressional intent to waive sovereign immunity and extend all of the protections of Section 504 to victims of discrimination by the federal government has been reaffirmed by the legislative history accompanying the 1992 reauthorization of the Rehabilitation Act of 1973.

In that history, Senator Jeffords, the primary author of the 1978 Amendments to Section 504, endorsed the statutory interpretations made by the Ninth Circuit in the *Doe* and *J.L.* cases, noting that any other interpretation would be:

> in direct contrast to rulings in the ninth circuit in *Doe* v. *Attorney General of the United States,* 941 F.2d 780 (9th Cir. 1991) and *J.L* v. *Social Security Administration,* 92 C.D.O.S. 6222 (9th Cir. July 15, 1992), and the intent of Congress in 1978 to cover the Federal Government with the same antidiscrimination mandate which is applied to private recipients of Federal financial assistance. [138 Cong. Rec. S16,609 (Oct. 5, 1992)].

Senator Jeffords expressly endorsed the Ninth Circuit's pronouncement in the *Doe* case that:

> [t]he Rehabilitation Act's legislative history... demonstrates Congress's intent...to permit enforcement [against the federal government] through the same means available against private parties; enforcement in the courts with *damages* and equitable remedies. [*Id.*, quoting *Doe, supra,* 941 F.2d at 793-794 (emphasis added)].

The 1992 legislative history thus confirms that the "language of the 1978 amendments is sufficient on its face to confer" a "private right of action against the Federal Government." 138 Cong. Rec. S16,609. Indeed, in the words of Senator Jeffords, "[t]o construe the statute otherwise would be the height of hypocrisy, expecting private entities to bear a burden that the Federal Government itself is unwilling to carry." *Id.*

In short, it is clear that the text, statutory structure and legislative history of Section 504 are sufficient to provide the required "unequivocal expression" of waiver of federal sovereign immunity to suit for monetary damages. The District of Columbia Circuit Court of Appeals was thus in error in holding that suit for monetary damages will not lie against the federal government under Section 504. This Court should reverse the D.C. Circuit's erroneous holding, and afford petitioner the damages remedy to which he is clearly entitled by Congressional mandate.

III. FAILURE TO RECOGNIZE A DAMAGES REMEDY DEFEATS CONGRESSIONAL INTENT THAT PEOPLE WITH DISABILITIES BE AFFORDED EFFECTIVE REMEDIES UNDER SECTION 504.

Contrary to Congressional intent to "enhance the ability of handicapped individuals to ensure compliance" S. Rep. No. 890, 95th Cong. *supra*, at 18, limiting the relief available to people with disabilities who are victims of unlawful discrimination at the hands of the federal government results in inconsistent and inadequate redress of the harm caused by discrimination. Federal government programs and regulations pervade the lives of people with disabilities, requiring that the federal government be an exemplar in its efforts to integrate people with disabilities into the mainstream of society. When federal officials discriminate in administering such programs, equitable remedies such as injunctions against future discrimination cannot provide effective recompense to the individual aggrieved. While

prospective relief may eliminate similar violations in the future, it does nothing to ameliorate the tangible harm suffered by individual plaintiffs.

Federal government activities, programs and regulations have significant bearing on the lives of people with disabilities. People with disabilities are beneficiaries of a wide variety of government programs. They are students in federal educational institutions, volunteers in the Peace Corps, and trainees in Jobs Corps programs.[12] People with disabilities are also directly affected by the vast array of federal regulatory activity, which can have a profound impact on the opportunities available to people with disabilities.[13]

The availability of damage awards in civil rights suits serves both the broad public purpose of eliminating discrimination throughout society,[14] and the private

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12 *See, e.g., Dorsey* v. *United States Dep't of Labor*, 41 F.3d 1551 (D.C. Cir. 1994).

13 For example, in the past several years the U.S. Department of Transportation has undertaken a review of physical qualification standards for interstate commercial drivers of certain classifications of motor vehicles, to ensure that they are consistent with the requirements of Section 504 of the Rehabilitation Act of 1973, and the Americans with Disabilities Act of 1990. 42 U.S.C. §§ 12101 *et seq*. This review was undertaken pursuant to the explicit direction of Congress as contained in legislative history to the ADA. *See* S. Rep. No. 116, 101st Cong., 1st Sess. 27-28 (1989); H.R. Rep. No. 485 (Part 2), 101st Cong., 2d Sess. 57 (1990). As a result of this review, the Federal Highway Administration has proposed modifications to its physical requirements for drivers of commercial motor vehicles. *See* 61 Fed. Reg. 609 (Jan. 8, 1996).

14 Discrimination "negates the billions of dollars we invest each year to educate our children and youth with disabilities and train and rehabilitate adults with disabilities." *See* S. Rep. No. 116, 101st Cong. 1st Sess., 18 (1989), H.R. Rep. No. 485 (Part 2), 101st Cong., 2d Sess., 46 (1990).

purpose of making victims whole.[15] In allowing damages awards, this Court has frequently noted the fundamental remedial principle that the possibility of retrospective compensation to victims provides an incentive to comply with legislation.[16] Especially where governmental entities are involved, potential damages liability may also have the beneficial effect of overcoming bureaucratic inertia, and spurring administrative action to end clearly discriminatory practices.

As this Court has acknowledged, the principle that damages are critical to effective enforcement of civil rights laws applies with even greater force to the government:

> A damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees, and the importance of assuring its efficacy is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." [*Owen* v. *City of*

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15 *See McKennon* v. *Nashville Banner Publishing Co.*, 115 S. Ct. 879, 884 (1995) ("Deterrence is one object of these [anti-discrimination] statutes. Compensation for injuries caused by the prohibited discrimination is another."); *Hensley* v. *Eckerhart*, 461 U.S. 424, 445 n.4 (1983) ("the public as a whole has an interest in the vindication of [civil] rights...over and above the value of a civil rights remedy to a particular plaintiff").

16 *See, e.g., Carlson* v. *Green*, 446 U.S. 14, 21 (1980) ("It is almost axiomatic that the threat of damages has a deterrent effect"); *Owen* v. *City of Independence, Mo.*, 445 U.S. 622, 651-52 (1980) (finding that liability will create an incentive for officials to protect civil rights, and that the damage remedy will encourage policymakers to minimize the possibility of discriminatory action); *Smith* v. *Wade*, 461 U.S. 30, 50 (1983) ("we assume, and hope, that most officials are guided primarily by the underlying standards of federal substantive law -- both out of devotion to duty, *and in the interest of avoiding liability for compensatory damages*." (emphasis added)).

Independence, Mo., 445 U.S. 622, 651 (1980) (holding municipalities liable for damages for civil rights violations)].

Congress has similarly recognized that private enforcement of civil rights statutes---and remedial provisions like damages and attorneys' fees that promote such enforcement---are critical to effective implementation of nondiscrimination mandates.[17] Such remedial provisions are a necessary counterweight to the special barriers that members of minority communities, including persons with disabilities, face in asserting their rights.[18] As "the poorest, least educated, and largest minority in America" people with disabilities have enormous difficulty obtaining legal representation.[19] Without a damages remedy available to afford tangible relief, those who experience even the most egregious discrimination have little reason to press their cause. This is all the more true in cases where discrimination is suffered at the hands of government officials, given added disincentives to litigate against sovereign entities.[20] Thus, without damages as an incentive for

17 *See, e.g.*, Senator Cranston's observation during the Senate debates over the 1978 Amendments to the Rehabilitation Act, in which he noted that "Private enforcement of these title V rights is an important and necessary aspect of assuring that these rights are vindicated and that enforcement is uniform." 124 Cong. Rec. 30,346 (1978) quoted in *Doe v. Attorney General*, 941 F.2d 780, 792 (9th Cir. 1991).

18 Given the costs attendant to litigation, this Court has recognized that poverty is an extreme barrier to the enforcement of basic civil rights. *See, e.g., City of Riverside v. Rivera*, 477 U.S. 561, 577 (1976).

19 *See* S. Rep. No. 116, 101st Cong., 1st Sess. 9 (1989) (quoting President George Bush).

20 These disincentives include the need to address administrative prerequisites, and defenses and immunities unique to litigation involving a federal party, which may necessitate additional attorney work hours.

individual enforcement, Section 504's promise of federal nondiscrimination rings hollow as a practical matter.

Lastly, damages are often the only vehicle for affording whole, or even adequate, relief to victims of federal discrimination, especially where equitable relief provides no relevant remedy for the individual. Both Congress and the Courts have recognized that administrative remedies and prospective injunctive relief often fail to address the individual's particular circumstance.[21] Moreover, even in situations in which equitable relief is responsive to an individual injury, it cannot provide full compensation for the inherent harm that accompanies civil rights violations. While compensatory damages cannot eliminate the anguish that attends discrimination, they are society's only way to provide redress for the injuries resulting from illegal discriminatory treatment, exclusion and lost opportunities.

CONCLUSION

It is simply not plausible, given the language of Section 504 as amended in 1978 and 1986, that Congress intended the federal government to be exempt from

21 *See, e.g., Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76 (holding monetary damages available in a Title IX case that came to judicial resolution only after the student had left the school system: "equitable remedies...are clearly inadequate....prospective relief accords her no remedy at all. The government's answer that administrative action helps other similarly-situated students in effect acknowledges that its approach would leave petitioner remediless.").

paying monetary damages to those whom it harms through disability-based discrimination. The D.C. Circuit's judgment to the contrary should be reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

JAMES GRIFFIN LANE,

Petitioner,

v.

FEDERICO F. PENA, SECRETARY OF TRANSPORTATION, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

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February, 1996

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BRIEF OF *AMICUS CURIAE* AMERICAN DIABETES ASSOCIATION IN SUPPORT OF PETITIONER

PRELIMINARY STATEMENT

The importance of a complete remedy for the violation of a right is deeply rooted in the common law. In commenting on Magna Carta, Lord Coke stated:

"And therefore every Subject of this Realm, for injury done to him *bonis, terris, vel persona* [i.e. goods, lands, or person], . . . may take his remedy by the course of the Law, by any other subject . . . and have justice and right for the injury done him, freely without sale, fully without any denial, and speedily without delay.

"Hereby it appeareth, that Justice must have three qualities, it must be Libera, quia nihil iniquius venali Justitia [free, for nothing is more iniquitous than justice for sale]; Plena, quia Justitia non debit claudicare complete, for justice should not do things by halves]; & Celeris, quia dilatio est quaedam negatio [swift, for justice delayed is justice denied]; and then it is both Justice and Right.[1]

Indeed, for justice to do right it must be complete.

> "It is a vain thing to imagine a right without a remedy; for want of a right and want of a remedy are reciprocal.[2]

In more modern words, the value of a right is defined by the remedy available if that right is violated.

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[1] Coke, *Second Institute* 55-56 (4th Ed. 1671) quoted in Thompson *Magna Carta: Its Role in Making of the English Constitution,* 1300-1629, at p. 365 (1948).

[2] *Ashby v. White*, 2 Raymond 953 (1703).

QUESTION PRESENTED

Should the executive agencies of the Federal Government, and only those agencies, be exempt from paying damages for harm caused by their violation of the Rehabilitation Act?

STATEMENT ABOUT *AMICUS*

Amicus Curiae, the American Diabetes Association ("Association") is the nation's oldest, largest and leading voluntary health organization addressing diabetes-related concerns. The mission of the Association is to prevent and cure diabetes and to improve the lives of all people affected by diabetes.

The Federal Government impacts the lives of the more than 16 million Americans with diabetes in many and varied ways. The Federal Government is the largest single employer in the country and the executive agencies regulate and control many of the benefits, privileges and rights of people with

diabetes. From the Veterans' Administration's provision direct medical benefits to the Department of Transportation's regulation of licensing of commercial truck-drivers, executive agencies have a pervasive influence on the care and employability of Americans with diabetes.

It is in this context that *amicus* urges this Court not to eviscerate the protections of the Rehabilitation Act concerning discrimination by the Federal Government for Americans with diabetes.

ARGUMENT

NATIONAL POLICY REQUIRES THE FULL PROTECTION OF CIVIL RIGHTS FOR THE DISABLED AND THE OPPORTUNITY FOR FULL EQUITABLE AND LEGAL REMEDIES FOR THE VIOLATION OF THOSE RIGHTS.

A right without a remedy is a cruel irony and a fundamental injustice. In this case, the D.C. Circuit has declared that the Department of Transportation violated Lane's rights under the Rehabilitation Act and that he is entitled to reinstatement as

a student at the United States Merchant Marine Academy, but is not entitled to recover the compensatory damages to which the parties have stipulated. This is a classic example of a right without a remedy and justice by "halves".

Lane's struggle with the Merchant Marine Academy is representative of the daily struggle of millions of persons with diabetes. Every day, Americans with diabetes face the consequences of prejudice, stereotyping and unfounded fear about diabetes, and especially the work capacity of Americans with diabetes. Although Mr. Lane had his diabetes under "extremely good control" and that he "repeatedly achieved an 'outstanding' rating on a physical readiness exam", he was denied the opportunity for education and employment as a merchant marine officer. The trial court in *Lane v. Pena* summarized Lane's ability most eloquently when he stated:

> ". . . the government, through taxpayer dollars, also made an investment in his training and, as Lane's record shows, their investment

> was a good one. It is undisputed that, if Lane continues to control his diabetic condition, he will make a fine merchant marine officer. . . ."
>
> "Indeed, the Court observes that the government will likely benefit greatly from his service." *Lane v. Pena*, 867 F.Supp. 1050, 1071-1072 (D.C. Cir. 1994).

This case exemplifies the need for the Rehabilitation Act to shield the most vulnerable of our citizens from arbitrary and irrational discrimination based upon "prejudice, stereotypes and unfounded fear."[3] If James Lane can be turned away so capriciously from the window of opportunity, then the shroud of prejudice shall darken the future for all disabled Americans. Lane's vindication needs to be twofold: his right to opportunity must be protected and the damage he suffered must be compensated. Lane must be made whole.

This Court has already recognized that the availability of damage awards in civil rights suits serve both the broad

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[3] *School Board of Nassau County, Florida v. Arline*, 480 US 273 (1987).

public purpose of eliminating discrimination and the private purpose of making the victims whole. *See*: *McKinnon v. Nashville Banner Publishing Co.*, 115 S.Ct. 879 (1995); *Hensley v. Eckerhart*, 461 U.S. 424 (1993). The potential of a damage award deters discriminatory practices and induces compliance with legislative mandates to protect Americans against such discrimination. *See*: *Owen v. City of Independence, Mo.*, 445 U.S. 622, 651-652 (1980); *Smith v. Wade*, 461 U.S. 30, 50 (1983).

How can we justify a technical argument that the executive agencies of the Federal Government, who by purpose and design protect the most vulnerable of our citizens from arbitrary and unreasonable practices, cannot be held responsible for the full consequences of their own discriminatory practices? How can we expect these agencies to protect the rights of disabled Americans if they themselves cannot be held responsible for the full consequences of their own discriminatory

practices? How do we impress upon these agencies that the law must be followed if the only consequence for their own discriminatory practices is equitable relief for a single person?

If the Rehabilitation Act is to accomplish its purpose, remedies for discriminatory practices must be sharply focused and uniformly applied. The remedy must reflect all of the consequences of discriminatory practices, including damages.

According to the Rosalind A. Knapp most recent statistics, there are over 16 million Americans with diabetes, about 7% of our population. Unfortunately, new cases of diabetes are being diagnosed at the rate of approximately 1,800 per day or over 650,000 Americans each year.[4] Diabetes is a growing national health problem with significant economic impact. Over 50% of the Americans with diabetes are women. Nearly 10% of the Afro-American, Mexican-American, Cuban-

[4] *Diabetes Statistics,* National Diabetes Information Clearinghouse, National Institutes of Health (NIH Publication No. 96-3926) (1995).

American and Puerto Rican-American ethnic and racial groups have diabetes while native Americans have nearly a 50% incidence rate of diabetes. As Americans age, the incidence of diabetes dramatically escalates.[5] The incidence of diabetes in the protected portions of our population (race, ethnic, gender and age) is large and is growing geometrically. Not only do our fellow Americans of various races, cultures and ethnic backgrounds face discriminatory practices based upon who they are, the fact that they have diabetes creates for some entities a further rationale for discrimination.

Americans with diabetes face serious health complications which include heart disease, stroke, high blood pressure, blindness, kidney disease, nerve disease, amputation, complications of dental disease and complications of pregnancy.[6] The

[5] *Diabetes In America,* National Diabetes Data Group, National Institutes of Health (NIH Publication No. 95-1468) (1995).

[6] Ibid.

life-long economic burden is enormous for Americans with diabetes.[7]

Economic burdens of health care and minority status when added to discriminatory practices based on disability can be an overwhelming burden on a citizen's capacity to exercise his rights. To deny a full remedy for the enforcement of rights deters the pursuit of those rights to the detriment of both the individual and society. As "the poorest, least educated and largest minority in America", people with disabilities have enormous difficulty accessing legal representation and enforcing their basic civil rights. *See: City of Riverside v. Riviera*, 477 U.S. 561, 577 (1976); *S. Rep. No.* 101-116, 101st Congress, First Sess. at 9 (1989).

Those who are discriminated against because of their disability have the right to compensation for damages in every jurisdiction and against every defendant except against a federal

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[7] Ibid.

agency in the District of Columbia. As a nation, we deal with the rights of ethnic and racial minorities and offer them protection and relief from the oppression of ignorance and prejudice. As a nation, we reach out for gender equality to create an equal opportunity for all of our citizens. As a nation, we protect the disabled from denial of equal access and opportunity solely because of their disability. Now, in the District of Columbia, various protected groups already under the panoply of the many and varied civil rights acts are confronted with a new barrier of inequality.

It is unacceptable that "prejudice, stereotypes and unfounded fear" about diabetes should be permitted to stop the progress toward equal opportunity and fair and equal treatment for persons with diabetes. The barrier created by the District of Columbia will chill the enforcement of the rights of the disabled under the Rehabilitation Act.

The trial court elaborated on the history of the inconsistent conduct by the Merchant Marine Academy where some, but not all, disabilities had triggered disenrollment and where there had been no individualized assessment of an outstanding student. Arbitrary and inconsistent decisions are the historical burdens suffered by persons with disabilities and, in particular, persons with diabetes. The present case highlights the need for complete remedies for vindicated rights because of arbitrary and inconsistent discriminatory practices.

A recent settlement in *Kenneth Dugger v. Lloyd M. Bentsen, Secretary, U.S. Dept. of Treasury, (C.D. Cal. 1994)* (Civil Case No. 93-2631) illustrates the recognition of the need to compensate for damages caused by discriminatory conduct towards a person with diabetes. Mr. Dugger filed his action under the Rehabilitation Act "to correct the unlawful employment practices in the job selection process and to make the plaintiff whole". Mr. Dugger's claim was based upon the fact

that his diabetes was the sole cause of his non-selection as a criminal investigator (special agent) for the Department of Treasury. After winning his Motion for Summary Judgment on the substantive merits, Treasury agreed to compensate Mr. Dugger for lost retirement contributions, lost back pay, compensatory damages and attorney fees and costs for the litigation.

The *Dugger* case illustrates two important points. First, it is an articulation of the kinds of damages that are suffered by disabled persons when they are discriminated against and when they attempt to enforce their rights under the Rehabilitation Act. In Mr. Dugger's case settlement was for $67,000. If there was no hope of reimbursement, it would be the rare plaintiff that could afford to spend or risk this amount of money to pursue his rights no matter how egregious the discrimination. Second, the prospect of an economic settlement forced additional accountability on the management within a federal agency. The potential of damages focuses the need to make

lawful and responsible decisions. Without this economic accountability, there is no compelling pressure that will impact budgets and decision-makers so as to deter and discourage discriminatory practices.

CONCLUSION

Amicus, on behalf of 16 million Americans with diabetes, asks this Court to make Mr. Lane whole and provide the meaningful remedies of the Rehabilitation Act for disabled Americans when they are discriminated against by the Federal Government. Mr. Lane's Petition in this case stands for equal justice under the law and for a full and fair remedy under the Rehabilitation Act.

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